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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 76

ELLIOTT ASHTON WELSH, II,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

**APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

APPENDIX

J. B. TIEZ
257 S. Spring Street
Los Angeles, California 90012
Attorney for Appellant

**(Filed April 1, 1969. Jurisdiction Postponed
October 13, 1969)**

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RELEVANT DOCKET ENTRIES

1. May 4, 1966. Indictment for refusal to submit to induction (C.T.2)
2. May 25, 1966. Trial (C.T.4)
3. May 26, 1966. Motion for Judgment of Acquittal filed (C.T.5)
4. June 1, 1966. Judgment. (C.T.7)
5. June 6, 1966. Notice of Appeal (C.T.9)
6. September 23, 1968. Order Directing Filing of Opinion and Dissenting Opinion and Filing and Recording of the Judgment.
7. January 31, 1969. Order Denying Petition for Rehearing.
8. February 18, 1969. Motion for Order Extending Time (Supreme Court).
9. April 28, 1969. Order Extending Time for Filing Petition for a Writ of Certiorari to May 30, 1969.
10. October 13, 1969. Order Granting Petition.

DOCKET ENTRIES OF THE DISTRICT COURT

No. 36138 Criminal

MINUTES OF THE COURT

Date: May 25, 1966

At: Los Angeles, Calif.

PRESENT: Hon. RUSSELL E. SMITH, District Judge
Deputy Clerk: Neil P. Cronin Reporter: Lloyd D. Olson
U.S. Attorney by Asst U.S. Attorney: Anthony M. Glassman
Defendant on bond Counsel J. B. Tietz

PROCEEDINGS: COURT TRIAL

Defendant and counsel present.

Malcolm F. Miller, is called, sworn and testifies for plaintiff. Plaintiff's exhibit 1 is admitted. Tobias E. Matthews, is called, sworn and testifies for plaintiff. Government Rests. Ruling reserved on defendant's motion for Judgment of Acquittal. Malcolm F. Miller, is recalled as a witness by the defendant.

Elliot A. Welsh, is called, sworn and testifies for defendant. Defendant's exhibit 3 is admitted by stipulation. Alice M. Hodge, is called, sworn and testifies for defendant. Defendant rests.

Counsel for defendant argues in support of motion for Judgment of Acquittal. Counsel for plaintiff argues in opposition and Court orders matter submitted.

Court orders bond of defendant continued in effect and recesses until 9:30 A.M., May 26, 1966.

Filed motion for Judgment of Acquittal by defendant.

John A. Childress

Clerk

By /s/ E. Ralph Davis

Deputy Clerk

No. 36138 Criminal

MINUTES OF THE COURT

Date: June 1, 1966

At: Los Angeles, Calif.

PRESENT: Hon. RUSSELL E. SMITH, District Judge
Deputy Clerk: Neil P. Cronin Reporter: Lloyd D.
Olson U.S. Attorney by Asst U.S. Attorney: Anthony
M. Glassman Defendant on bond Counsel J. B.
Tietz

PROCEEDINGS: COURT TRIAL

This cause was called for sentence this day. Defendant and his counsel present.

Defendant's motion for Judgment of Acquittal is ordered denied. Remarks by Attorney Tietz on behalf of defendant.

Court sentences defendant to 3 years imprisonment and Stay of Execution is granted until June 10, 1966.

Defendant released on his own recognizance until June 10, 1966 at which time other arrangements with respect to stay and bond shall be more.

John A. Childress

Clerk

By /s/ E. Ralph Davis

Deputy Clerk

On this 1st day of June, 1966 came the attorney for the government and the defendant appeared in person and¹ by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty, and a finding of guilty of the offense of knowingly refusing to be inducted into the Armed Forces of the United States in violation of Title 50, United States Code, Appendix 462 of the Draft Act as charged³ in the Indictment of 1 count and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ three (3) years.

¹Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

²Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

³Insert "in count(s) number " if required.

⁴Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively

IT IS ORDERED that a Stay of Execution is granted until June 10, 1966.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Russell E. Smith
United States District Judge
 /s/ Neil P. Cronin
 Clerk

John A. Childress, Clerk
 Filed: June 1, 1966

INDICTMENT

The Grand Jury charges:

(50 U.S.C. App. 462)

Defendant ELLIOTT ASHTON WELSH II, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and became a registrant of Local Board No. 95 said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the

and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on December 8, 1965, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant knowingly failed and neglected to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill

/s/ Earl J. Esse
Foreman

/s/ Manuel L. Real
United States Attorney



GOVERNMENT'S EXHIBIT 1

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote	
		Yes	No
DEC 14 1961	1 A RMW	2	0
DEC 21 1961	Form 110 Mailed		
JAN 15 1963	Application for Permit rec'd.		
FEB 5 1963	SSS Form 300 issued expiring March 16, 1964		
MAR 27 1964	SSS Form 223 mailed for physical on app 30 1964		
4-24-64	Completed SSS Form 150 rec'd. - opposed to combatant service		
MAY 8 1964	SSS Form 62 mailed. ACC		
MAY 12 1964	1-A-0 RMW	3	-
MAY 15 1964	Form 110 Mailed		
5-25-64	Letter of Appeal and request for personal appearance received.		
JUN 5 1964	Form C-310 mailed reg. to appear before Board at 9:45 A.M., 6-9-64		
JUN 9 1964	Revised to 1-A-0 RMW	3	0
JUN 10 1964	Form 110 Mailed		
JUN 19 1964	Letter of Appeal received		
JUN 19 1964	File forwarded to Appeal Board		
7-23-64	The Appeal Board tentatively determines this registrant should not be classified in I-O or in a lower class.	3	0
11/15/65	File returned by appeal board, class. I-A, vote 3-0 NOV 10 1965		
NOV 19 1965	SSS Form 110 "Notice of Classification" mailed to the registrant.		
NOV 22 1965	SSS Form 252 mailed for Induction on DEC 8 1965		
12/21/65	Papers returned - Refused induction		
DEC 29 1965	File forwarded to SHQ		
1/5/66	File ret. from SHQ		
Jan 10 1966	with cc of ltr from SHQ dated 3 Jan 1966 SSS-301 mld to U.S. Attorney; cc to SHQ		
1/19/66	File forwarded to SHQ		

In Answer to Series II, Item 2.

I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding "duty"¹ to abstain from violence toward another person) is not "superior to those arising from any human relation." On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant. One might say, in this instance at least, that my duty to the Government is incalculably inferior to "those arising from any human relation."

RECEIVED
Local Board Group "C"

APR 24 1934

1301 Westwood Blvd.
Los Angeles 24, Calif.

1. I think that the use of the word duty, to refer to one's reasons for refusing to kill, is entirely inappropriate. It seems absurd to be obliged to demonstrate the existence of some sort of "duty" which forbids one man to kill another.

In Answer to Series II, Item 3.

Taken literally, this question is very difficult to answer. A sane, civilized human being believes it is wrong to willfully kill or injure another. Ask him how, when, and from whom or from what source he acquired this belief and he will probably not be able to answer. The relevant question is: explain how, when and from whom or from what source you acquired the belief that, in wartime, your status as a sane, civilized human being cannot be revoked. The answer to this question is easier. I came to my position (more precisely, realization) through a series of conversations with a number of pacifists, starting in August of 1962.

RECEIVED
Local Board Group "C"

APR 24 1964

1301 Westwood Blvd.
Los Angeles 24, Calif

In Answer to Series II, Item 5.

I presume that the term force used here, means, the physical act of preventing someone from doing something, compelling someone to do something, or threatening such prevention or compulsion. Of course physical restraint or compulsion is proper in some circumstances—and the circumstances dictate what sort of force to employ. One may hold back a child who is trying to put his fingers into a light socket, to prevent the child from being electrocuted. One may shoot the child to prevent him from putting his fingers into a light socket—and thus prevent him from being electrocuted. The former exercise of force seems more wise.

RECEIVED
Social Board Group "C"

APR 24 1934

1301 Westwood Blvd.
Los Angeles 24, Calif

Elliott Ashton Welsh II
May 25, 1964

Selective Service
Draft Board #95
1301 Westwood Blvd.
Los Angeles, Calif., 90024

RECEIVED

1-101 Westwood Blvd.

MAY 25 1964

1-101 Westwood Blvd.
Los Angeles 24, Calif.

Gentlemen:

I wish to appeal my I-A-O classification, to amend my claim for exemption as a conscientious objector (for reasons given below), and to request a personal appearance before the Board if the Board deems it necessary for me to elucidate any of my statements below.

The substance of my emendation deals only with Series I of SSS Form 150, "Claim for Exemption," in which I indicated that I claimed exemption from combatant training and service. I wish to reiterate and sustain that claim and, further, to add that I now object to noncombatant service in the armed forces also.

When I was confronted with the choice between the two statements in Series I I chose statement "A" because I felt that by refusing combatant training I would still be able to perform service while still maintaining my commitment to my beliefs as set forth in Series II. After further reflection, however, I now feel that any participation in the armed forces implicitly condones and contributes to the mission of the military. For example: if drafted, I would probably be sent into the Army Medical Service. I might be assigned to an examination center to help conduct pre-induction physical examinations.¹ I cannot very well abjure the use of violence while facilitating the operation of the selective service system at the same time. One who would not be a butcher had best not become a meat packer.

Thank you for your consideration.

Sincerely

Elliott Ashton Welsh II

1. Any example is valid since I obviously have no choice of duties.

PERSONAL APPEARANCE

Elliott Ashton Welsh II
SS No. 4 95 41 736

June 9, 1964

Present: Roger S. Marshall
Alvin M. Asher
Irl R. Goshaw

Registrant stated he was classified I-A-O but after thinking it over he feels he should be classified I-O. He says the letter in this file states his feelings.

Registrant was informed that since he has appealed the I-A-O classification, his file would go to the Appeal Board and they would investigate to determine whether or not he qualifies for a I-O classification.

Notes taken by:

Alma Whisenant
Alma Whisenant, Coordinator

Selective Service
Local Board No. 95
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Cal.; 90024

June 18, 1964

4-95-41-736

RECEIVED
Local Board Group #0

JUN 19 1964

1301 Westwood Blvd.
Los Angeles 24, Calif.

Gentlemen:

I hereby appeal my 1-A-O classification of June 10, 1964, on grounds set forth in my letter of May 25, 1964, to 1-O.

I wish to protest the arbitrary manner of classification, under which I could be classified 1-A-O, but not considered eligible for 1-O classification. This seems inconsistent.

I deplore* the method used by the Board during my personal appearance to mitigate the Board's responsibility in my case. I appeared before the Board to answer questions about my appeal and to explain my position in the light of those answers. I asked whether any members of the Board said my questions about my appeal. They

* and protest

page one of three

RECEIVED
Local Board Group "C"

JUN 19 1964
1301 Westwood Blvd.
Los Angeles 24, Calif.

had none. Then one of the Board members said, "We don't have the authority to pass on your classification. It will have to go to the Appeal Board." This is an outright lie, since the Board does indeed have the power to grant any classification as it sees fit. The only possible circumstance I can imagine, granting that the Board was acting in good faith, in which this statement could be justified is if the Board is required, as a matter of Selective Service policy, to pass such cases as mine on to the Appeal Board. In this circumstance, why have a personal appearance before the Board at all? I find it rather hard to defend myself against the private policies the Selective Service seems to favor. My position was stated quite clearly, I think, in my original letters: if

1. This quotation is as given to me in a recall. A secretary was transcribing the conversation so the statement should be a matter of record.

The Board disagrees with me & thinks I
deserve some intimation of the reasons for
its disagreement.

Sincerely,

Will A. Walsh Jr

RECEIVED
Local Board Group "C"

JUN 19 1964

1301 Westwood Blvd.
Los Angeles 24, Calif.

State of California

Date 28 July 64

1205 64

1205 64

Honorable Francis G. Whelan
The United States Attorney
Federal Post Office & Courthouse Bldg.
312 North Spring Street
Los Angeles, California 90012

Subject: WELSH, II, Elliott Ashton
SS No. 4-55-41-736

Dear Sir:

The complete selective service file of the above named registrant is forwarded under the provisions of Section 1626.25(b) of Selective Service Regulations.

This panel has reviewed the file and tentatively determined the registrant should not be classified in Class I-O or in a lower class.

This file is forwarded for the purpose of securing an advisory recommendation from the Department of Justice.

Please acknowledge receipt of the file on the copy of this letter.

Very truly yours,

BY DIRECTION OF THE BOARD OF APPEAL
Panel No. 3

Clerk, Board of Appeal

Encl.- Cover sheet



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Opinion and for the Selective Service System in the Southern Federal Judicial District of the State of California

AUG 27 1965

Address Reply to the
Division Indicated
and Refer to Initials and Number

Chairman, Appeal Board, Southern
District of California, Panel No. 3
Selective Service System
Room 206 Bendix Building
1206 Maple Avenue
Los Angeles 15, California

AUG 23 1965

Re: Elliott Ashton Welsh II
Conscientious Objector

Dear Sir:

As required by Section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the captioned matter and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Owen J. Brady, a Hearing Officer for the Department of Justice.

The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resume of the Inquiry attached hereto and made a part hereof.

Registrant was born in Culver City, California on November 7, 1941. His mother is a Christian Scientist and the registrant claims membership in no religious organization. He graduated from high school at Santa Monica, California in June 1959 in the top one-quarter of his graduating class of 547. He attended the University of California at Los Angeles from the fall of 1959 until his dismissal for scholastic reasons in June 1960, and attended Santa Monica City College from the fall of 1960 through the summer of 1961 attaining B and C grades. He attended Montana State University, Missoula, Montana from September 1961 until his dismissal for low grades in January 1963,

and that after he withdrew from two courses at the University of California at Los Angeles in the summer of 1963. His SSS Form 100, received by his local board in December 1961, made no claim of conscientious objection. His SSS Form 150, received by his local board on April 24, 1964, claimed conscientious objection as to combatant but not noncombatant military training and service. By letter from the registrant received by his local board on May 25, 1964, registrant stated that he wished to amend his SSS Form 150 to claim conscientious objection as to combatant and noncombatant military training and service. His local board classified him I-A-O after a personal appearance by registrant before it and he appealed.

Annexed hereto and made a part hereof is Exhibit A submitted to the Department of Justice in behalf of the registrant.

Registrant appeared before the Hearing Officer at Los Angeles, California on July 19, 1965, accompanied by an attorney. The registrant acknowledged having received a copy of the resume and stated in correction of the first paragraph that he is not a Christian Scientist. He told the Hearing Officer that he had attended Presbyterian Sunday school weekly from age 5 to age 12, and had attended Christian Science Church weekly from age 12 to age 16 or 17, and that since age 17 he has not attended any church except that since then he has attended the Unitarian Church on two or three occasions and has attended meetings of the Quakers on two or three occasions. He qualified his regular attendance at Sunday school and church by stating that his mother made him attend and that he never got anything out of it. He said he had engaged in a peace march sponsored by the Committee for Non-Violent Action-West in the summer of 1961, when a number marched from San Diego north to Vallejo, California, and he participated in the march from Port Hueneme to Carpinteria, a distance of ten or fifteen miles, and that he had demonstrated at Vandenberg Air Force Base.

The Hearing Officer commented that the registrant appeared to be intelligent, notwithstanding his low grades at the University of California at Los Angeles and Montana State University. He questioned the registrant as to his belief in the existence of God or a Supreme Being and reported that the registrant has no belief in such; that he believes in the "natural law" as a force outside of men but the force as such is not an entity, and he seemed unable to explain further what he meant by the "force". The Hearing Officer reported that as to "natural law" the registrant recognized that, just as there are certain physical laws in nature, such as gravity and electrical impulses, there are laws affecting the relationship of human beings such as the feeling of gregariousness; that ethics are implicit within us governing the conduct of individuals, which he refused to relate to the questions of guilt, punishment or reward, and he does not believe in a life after death or in a life of what might be called a human soul. He stated that human life is valuable both to the individual and to the world at large; that his primary objection to military service is that the military is involved in taking a human life, and that life should not be voluntarily taken. He said he believed that war is a social institution which has a bad effect on the society which engages in it, and that war does not settle things, is inefficient and wasteful; that "if I see a situation is foolish or unreasonable then I will not participate in it." He said he believed in birth control but was uncertain whether birth control meant taking life; that he believed in preventive birth control and not in the interruption of gestation "if it can be helped." He said that he himself would want to limit his family for social reasons. The registrant stated that there should be no armies, even for defense or resistance to aggression, and even if another political force should take over the country. As to the question of a policeman apprehending a criminal, his convictions were not explained or made clear. He reiterated that he did not believe in taking a human life but he did not see it as a moral or religious wrong but simply as a social "error" or illogical act. The Hearing

Officer reported that several times the registrant denied that any of his thinking had a religious basis. He conceded the possibility that some of his early religious training may have rubbed off on him but he stressed that his belief is that his opinions have been formed by reading in the fields of history and sociology, and that they are purely "rational" as opposed to religious.

The Hearing Officer found that the registrant is sincere in his convictions but that his ideas are incomplete and,, as the registrant admitted, in the process of formulation. He found that the registrant does not believe in life after death, does not believe in God or in any other being or entity outside of man which has any authority over men. He found that the registrant does not believe in any system of ethics or in a set of prescribed rules of human conduct except to the extent that he feels that some things are "right" and some things are "wrong" such as killing, stealing, adultery and the like, his authority for these feelings being that they are "laws of being" tantamount to conscience. He found that the registrant does not believe in religious beliefs or in authority for such beliefs. The Hearing Officer found no religious basis for the registrant's conscientious-objector claim and concluded that the registrant's claim does not come within the provisions of the statutory exemption in the Universal Military Training and Service Act, as amended. He recommended that the conscientious-objector claim of the registrant be not sustained.

In his Special Form for Conscientious Objector as received by the local board on April 24, 1964, the registrant signed part (A) of Series I claiming exemption from combatant military training and service only, and also struck out the words "my religious training and" so that the statement reads, "I am, by reason of belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces." The registrant also marked the "No" box in

Question 1 of Series II of that form. In his Exhibit A, hereto annexed, the registrant has sought to modify his answer to Question 1 of Series II stating:

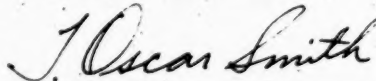
"* * * I wish to have this answer stricken and the question left open. In answering the question I understood the term 'Supreme Being' to mean, 'The eternal and infinite Spirit; God.'¹ I do not pretend to know what 'The eternal and infinite Spirit' may be, and I do not believe in God--in the everyday sense²--and I so indicated. * * *"

In his note 1 the registrant has referred to Webster's New Collegiate Dictionary, Sixth Edition, page 853, and in his note 2 he has referred to the standard notion of God in Webster's Third New International Dictionary, Unabridged. The registrant in his Exhibit A has attempted amendment of his Special Form for Conscientious Objector at the time of the hearing to leave the question of existence of a Supreme Being open, but he is apparently content with his denial of religious training and belief. It is believed that the record of the registrant in substance denies religious training and belief as well as belief in a Supreme Being but claims exemption by reason of his personal belief. In the case of United States v. Seeger, 380 U.S. 163, the test for exemption from military service as a conscientious objector is stated to be whether a given belief, that is sincere and meaningful, occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. The Department of Justice believes that the record and the findings of the Hearing Officer are such that the registrant does not come within the statutory definition of conscientious objector as construed in the Seeger case.

The Department of Justice concludes that the registrant has failed in his burden of proof and recommends to your Board that his conscientious-objector claim be not sustained and that he be not classified in Class I-O or in Class I-A-O.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,

A handwritten signature in cursive script that reads "T. Oscar Smith".

T. Oscar Smith
Chief, Conscientious-Objector Section

Resume of the Inquiry

Re: Elliott Ashton Welsh II

Conscientious Objector

Registrant was born in Culver City California, on November 7, 1941. He is a Christian Scientist. The inquiry does not disclose the religious affiliation of his parents.

Records of Santa Monica High School, Santa Monica, California, reflect that registrant entered this institution in June, 1956, and was graduated in June, 1959, ranking academically in the top quarter of a class of 547 students. During the summer of 1959 he attended Santa Monica City College, Santa Monica, California, receiving a grade of A in a 5-hour mathematics course.

Records of the University of California at Los Angeles, California, reflect that registrant was admitted to this institution at the beginning of the fall semester in 1959; and that he was placed on probation in January, 1960, and dismissed for scholastic reasons in June, 1960. Nevertheless, while there he received grades of "E" in courses in Analytical Geometry, Automatic Digital Computer, Introduction to Psychology, and Fluid Heats Sound. He again attended Santa Monica City College for the 1960 fall term, and the 1961 spring and summer terms, maintaining approximately an average grade of "B", for the first two terms and one of "C" for the 1961 summer term.

Records of Montana State University, Missoula, Montana, reflect that registrant entered that institution as a mathematics major in September, 1961. During the summer of 1962, he took a course at Santa Monica City College, receiving a grade of "F". Registrant was dismissed from

Montana State University for low grades in January 1963. Its records have a notation that due to physical disability, registrant was exempt from ROTC and athletic activities. During the second summer session in 1963, registrant took and withdrew from two courses at the University of California at Los Angeles. In view of his withdrawal, registrant received no grades in these courses.

At the time of the inquiry, the records clerk of Santa Monica City College stated that most instructors were on vacation, and that past experience indicated that owing to the size of classes, instructors were generally unable to recall former students. An employee of the University of California at Los Angeles made a generally similar statement with respect to instructors at that institution. At the time of the inquiry, Montana State University was in recess.

While unemployed and living off an inheritance, registrant shared an apartment in Venice, California from about February, 1963, to June, 1964, with a fellow student at the University of California at Los Angeles who had earlier been a high school mate of registrant. This apartment mate considers that registrant is a person of good character and reputation. Registrant told this friend that registrant could never bring himself to kill another person for any reason, and that registrant is opposed to capital punishment. The owner of this apartment considers that registrant is a person of good character and reputation, but is uninformed as to registrant's views on military service.

Another such fellow college student and schoolmate likewise considers that registrant is a person of good character and reputation and ^{states} that he is strongly opposed to the killing of other persons and to capital punishment. This sometime schoolmate states that registrant has previously participated in peace marches. Both associates consider that registrant is sincere in his claim to be a conscientious objector.

At the time of the inquiry, registrant had shared living quarters for about four months with a male student whom registrant first met while attending the University of California at Los Angeles. This roommate similarly characterized registrant as a person of good character and reputation, as one sincerely opposed on personal, rather than religious, grounds to killing another person. While registrant's discussion with his roommate of registrant's opposition to military service has been brief, the roommate considers that registrant is sincere in his claim to be a conscientious objector. The roommate adds that registrant does not know any people in the neighborhood in which the two of them reside.

Disciplinary and dormitory officials and personnel of Montana State University have no record that registrant was a disciplinary problem and have no recollection of him. One dormitory housekeeper states that registrant was a reserved person, seemingly with few friends, and that in his conversations with her did not indicate that he is conscientiously opposed to military service.

Registrant's family moved to the 800 block of 26th Street, Santa Monica, California, in 1942. A couple who are next-door neighbors to registrant's family consider him a person of good character and reputation. The husband has heard registrant's mother mention that registrant is a conscientious objector. The husband believes that registrant's claim to be one is probably sincere. The wife describes registrant as a quiet, studious person, and believes that registrant is sincere in his claim to be a conscientious objector. She has heard that registrant has succeeded in developing a successful method or system of winning at gambling and that registrant goes periodically to Las Vegas to gamble.

The father-in-law of registrant's sister has known registrant for many years, and characterizes him as a person of good character and reputation, quiet, and studious. The father-in-law, who is aware of registrant's claim to be a conscientious objector, considers that registrant is

sincere in making that claim, and that registrant leads a life consistent with it. The husband of registrant's sister was a high schoolmate of registrant and a fellow student at Santa Monica City College. During the past three or four years, this brother-in-law has often heard registrant express pacifist views. On the basis of registrant's belief that war is unjustifiable in any circumstance, registrant's brother-in-law considers that registrant is sincere in his claim to be a conscientious objector.

No criminal or credit record respecting respondent was located in the areas in which he has resided and attended school in Los Angeles and Santa Monica, California, and Missoula, Montana.

PREPARED: November 27, 1964

Elliott A Welsh II
818 26th Street
Santa Monica, Calif.
June 22, 1965

Local Board No. 95
Los Angeles County
1301 Westwood Blvd.
Los Angeles 24, Cal.

Sirs:

In my original claim for classification as a conscientious objector (Form SSS 150) I answered the question (1.), "Do you believe in a Supreme Being?" in the negative. I wish to have this answer stricken and the question left open. In answering the question I understood the term "Supreme Being" to mean, "The eternal and infinite Spirit; God."¹ I do not pretend to know what "The eternal and infinite Spirit" may be, and I do not believe in God—in the everyday sense²—and I so indicated.

It has since been brought to my attention that the term "Supreme Being" may have a broader meaning than the one I had given it (though what it means exactly I have been unable to learn), and that I would be well advised to better inform the Board in more detail about my beliefs concerning ethical conduct and conscience, given the possibility that I do, after all, believe in a "Supreme Being."³

Presumably⁴ the Board is interested in the nature of my belief insofar as it relates to the Law. The answer to the problem would seem to lie in the answer to the question, "Why am I a conscientious objector?"^{5,6,7} "What concepts do I adhere to as guiding principles?"

I believe each of us to possess some sort of ethical apparatus, a conscience⁸, if you will. A sense of conscience is extremely difficult to describe so that it means something.⁹ Indeed, some philosophers declare that it is impossible to talk about ethics in a rigorous fashion. That is, it is impossible to assert the absolute truth or falsity of an ethical law.¹⁰ But, despite the lack of logical validation, we do act, we do make decisions. Thus only in our actions¹¹ and ethical decisions is our sense of conscience revealed.

I have not been specific about my refusal to participate in the military vis-à-vis conscience. I do not believe it is possible to be. I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, as a nation, fail our responsibility as a nation. I see that in our refusal to recognize the "enemy" as a collection of individuals, we also lose our sense of individuality. It is suggested that those who implement policy are fully aware of these facts, but that they must be realistic. "When confronted by armed aggression," they ask, "how else can we respond?" My questions: What measures could we have taken to alleviate the "social problem" peacefully? To what degree are we economically and socially committed to "look for" aggression? To what extent

do we thus depend on it?

I cannot fully account for my decision intellectually.

"What we cannot speak about we must pass
over in silence." 12

Sincerely,

Elliott A. Wash

NOTES

1. Webster's New Collegiate Dictionary, Sixth Edition, page 853.
2. Since that time I have found the standard notion of God defined fairly well in Webster's Third New International Dictionary, Unabridged.

"the holy, infinite, and eternal spiritual reality presented in the Bible as the creator, sustainer, judge, righteous sovereign, and redeemer of the universe..."

3. I do not intend to be facetious here; I am truly puzzled by the meaning of the law as the "religious training and belief" clause modifies it. Just what does "Supreme Being" mean? If only those who believe in a "Supreme Being" can be classified conscientious objectors, what of those who profess no such belief, but who are "conscientiously opposed to participation in war in any form"?
4. I use the word advisedly. The Board members apparently had not read my letter of appeal prior to my appearance before them. They indicated that they had no questions to address to me concerning my claim as entered. The proceeding was treated perfunctorily; the Board's abdication of decision in my case is apparently a matter of policy, I later learned. So the "hearing" was not that at all; it was merely a formality. No consideration was taken of the appeal per se. If the hearing was meant to be a means of

NOTES CONTINUED

obtaining administrative review, it did not fulfill its purpose.

5. Were I not granted relief under Title I, sec. 6(j), of the Universal Military Training and Service Act, as Amended, I would be required to enter the service of the Government of the United States, which service involves not only the performance of duties which are onerous, but worse, the implied profession of commitment to the military ethic. I would not so much mind the cleaning of latrines per se; what I would object to is the fact that I am cleaning latrines in support of an institution which has become, quite simply, less than useful to the conduct of human affairs. I am afraid reason has already subverted my commitment to the military ethic.

6. "The function of the profession of arms is the ordered application of force to the resolution of a social problem."

Lieutenant General Sir John Winthrop Hackett, The Profession of Arms, page 3, The Times Publishing Co., London, 1963.

Doesn't he mean "elimination of the social problem"? If those who are causing a "social problem" are prevented from acting by means of force, the social problem is not resolved, really, it is either suspended or eliminated."

NOTES CONTINUED

7. Ordered application of force to the resolution of a social problem: George F. Kennan on World War I:

"History reveals that every one of the warring powers would have been better off to have concluded peace in the early stages of the war on the adversary's terms rather than to accept the loss of life attendant on continuation of the war to 1918. This loss inflicted on each of the belligerents a subjective damage from which it could not recover, even superficially, for at least a generation. In a deeper sense, some may be said to have not fully recovered to the present day."

Emphasis in the original. "The Price We Paid for War," The Atlantic, Oct., 1964.

8. "the sense of right or wrong within the individual; the awareness of the moral goodness or blameworthiness of one's own conduct, intentions, or character together with a feeling of obligation to do or be that which is recognized as good often felt to be instrumental in producing feelings of guilt or remorse for ill-doing; specif: the part of the superego in psychoanalysis of which the ego is conscious and through which the commands and admonitions of the superego are communicated to the ego."

Webster's Third New International Dictionary, page 482.

9. "...the good is an indefinable, indescribable, unverbalizable essence of some sort. He says, well, it's like yellow, like my awareness of yellow

NOTES CONTINUED

here on this paper:.....That the perception of good is like the perception of yellow. When you try to put it into words, when you don't have a commandment from God or from habitual upbringing, and you don't really distinguish what's useful for your nation from what's honorable, goodness becomes empty, almost nothing. But when you think of the good as like yellow, like the yellow of the paper that's in front of us right now, just like that, you encounter it, it's yellow, it's indescribable, it's indefinable, not because it's so abstract, but because it's so concrete. And this is really the inadvertent point of G. E. Moore's great work on ethics, that the good is really not to be found in the useful, but rather in our own personal confrontation with something that's cockeyed wrong, or horribly bad, or something that's pretty right and O.K.If you have to talk about morality, you're doing it off the top of your brain, and this is not the way you make moral decisions. You make them by confronting the facts in the case, the way you confront the yellow on this paper. And when all the facts are there, you simply see whether it's good or not good to do something."

P. P. Hallie, A Symposium on Morality, The American Scholar, Summer 1965, page 352-353.

10. "6.4 All propositions are of equal value.
- 6.41 The sense of the world must lie outside the world. In the world everything is as it is, and everything happens as it does happen: in it no value exists--and if it did exist, it would have no value.
- If there is any value that does have

NOTES CONTINUED

value, it must lie outside the whole sphere of what happens and is the case. For all that happens and is the case is accidental.

What makes it non-accidental cannot lie within the world, since if it did it would itself be accidental.

It must lie outside the world.

6.42 And so it is impossible for there to be propositions of ethics.

Propositions can express nothing that is higher.

6.421 It is clear that ethics cannot be put into words.

Ethics is transcendental.

(Ethics and aesthetics are one and the same.)

6.422 When an ethical law of the form, 'Thou shalt...', is laid down, one's first thought is, 'And what if I do not do it?' It is clear, however, that ethics has nothing to do with punishment and reward in the usual sense of the terms. So our question about the consequences of an action must be unimportant.--At least those consequences should not be events. For there must be something right about the question we posed. There must indeed be some kind of ethical reward and ethical punishment, but they must reside in the action itself.

(And it is also clear that the reward must be something pleasant and the punishment something unpleasant.)

6.423 It is impossible to speak about the will in so far as it is the subject of ethical attributes.

And the will as a phenomenon is of interest only to psychology.

6.43 If the good or bad exercise of the will does alter the world, it can alter

NOTES CONTINUED

only the limits of the world, not the facts--not what can be expressed by means of language.

In short the effect must be that it becomes an altogether different world. It must, so to speak, wax and wane as a whole.

The world of the happy man is a different one from that of the unhappy man."

Ludwig Wittgenstein, Logisch-philosophische Abhandlung,

Routledge & Kegan Paul, London, 1963, page 145. Translated by D. F. Pears and B. F. McGuinness.

1. or reactions
2. Ludwig Wittgenstein, op cit.

Elliott A. Welsh II
441 Sherman Canal
Venice, California

October 13, 1965

Chairman, Appeal Board,
Southern California,
Panel No. 3
Selective Service System
Room 206 Bendix Building
1206 Maple Avenue
Los Angeles 15, California

Appeal Board for the Selective Service Sys-
tem in the Southern Federal Judicial District
of the State of California

OCT 14 1965

Dear Sir:

I would like to comment upon and correct several statements found in the Letter of the Attorney General which describes the inquiry made by the Department of Justice into my claim for exemption as a Conscientious Objector.

- I. "He qualified his regular attendance at Sunday school and church by stating that his mother made him attend and that he never got anything out of it."

Letter, page 2.

If I used the words, "I never got anything out of it," I intended to mean, "I never became a Christian Scientist. (Which, of course, was presumably the point of attending that particular Sunday school.)" It would be unreasonable to contend, and I certainly do not mean to imply, that the religious training I received there had nothing to do with the ethical or moral values I live by.

- II. "He said that he had engaged in a peace march sponsored by the Committee for Non-Violent Action-West in the summer of 1961, when a number marched from San Diego north to Vallejo, California, and he participated in the march from Port Hueneme to Carpinteria, a distance of ten or fifteen miles, and that he had demonstrated at Vandenberg Air Force Base."

Letter, page 2.

I did not participate in the march from Port Hueneme to Carpinteria; rather, I visited the march in both places (I was not at the time a pacifist, holding, in fact, views antagonistic to pacifism.) since I had become interested in what the marchers had to say.

III. "...He (the registrant) believes in the 'natural law' as a force outside of men but the force as such is not an entity, and he seemed unable to explain further what he meant by the 'force'."

Letter, page 3

I believe Mr. Bradley confused the term "natural law" as I used it with Natural Law as the term is used in philosophy and law. Mr. Bradley insisted upon describing what I called "natural law" as a "force", whereas I simply meant "natural law" to be taken as "the laws of nature". The laws of nature are "outside", or beyond the control of men, but it is to perpetrate a semantic absurdity to characterize either "natural law" or "force" as an "entity", and in trying to avoid doing so I may have caused Mr. Bradley to misunderstand me.

At this point it might be well to comment upon the manner and substance of the inquiry. It might seem as if I had ample opportunity to correct any misconceptions in Mr. Bradley's mind during the course of a face to face encounter, but this was not so (especially concerning that portion of the interview dealing with birth control, which I shall mention later). Nominally, the inquiry was made to determine whether or not I am a Conscientious Objector. It is apparently the Justice Department's idea that one can learn whether or not a person is a Conscientious Objector by asking him a number of set questions of the type: "...what would you do if attacked by a man with a club? Would you attempt to stop him with

physical force? Do you think a country is justified in protecting itself?" and the like. The kinds of questions asked, and the kinds of answers expected suggests a rather limited preconception of what a Conscientious Objector is, and the nature of Conscientious Objection. Obviously, the reasons for the limited definition of the term "Conscientious Objector" are too complex to go into here, but I would not think it too presumptuous to suggest that a more flexible approach be used; that the Hearing Officer spend his time "getting to know" the subject of the inquiry, trying to understand what he has to say about his objection, rather than trying to determine his belief or non-belief in a "Supreme Being", with the implied presupposition that the subject is insincere. The reason I left Mr. Bradley with a somewhat distorted, and certainly incomplete, knowledge of me and my beliefs is that there was no "feedback", no way of knowing whether or not he did actually understand me, or whether he understood me only in terms of the Justice Department's idea of what a Conscientious Objector is supposed to be.

I almost hesitate to add that I feel quite strongly that it is not any business of the Government whether or not I believe in a "Supreme Being" (which the Government "seems unable to explain" the meaning of). Surely the Board, the Justice Department, the FBI, et. al. understand the meaning of the term "conscientious objector":

"One who, for conscience' sake, objects to warfare or to military service."

--Webster's New Collegiate
Dictionary, Second Ed.

- IV. "...ethics are implicit within us governing the conduct of individuals, which he refused to relate to the questions of guilt, punishment or reward, and he does not believe in a life after death or in a life of what might be called a human soul."

Letter, page 3

I don't believe I was asked to relate the fact that "ethics are implicit within us" to the "questions of guilt, punishment or reward". And is "guilt" a question? Is "punishment or reward" a question? I, frankly, do not understand how it can be so. The Justice Department's rendering, "ethics are implicit within us," might be expressed better as, "that we do, in fact, choose, as individuals, a system of ethics, a set of ethics or ethical values, or perhaps no ethics. The point being that ethics, as a set of rules or modes of behavior 'governing the conduct of individuals', arises as a result of human interaction and experience and that religious beliefs are ethical but that not all ethical beliefs are religious." Which is not as concise, but certainly more meaningful. In other words, ethics is a cultural phenomenon, even as religion is a cultural phenomenon. I should have added perhaps, that I believe both ethical and religious values usually arise from the same source: the individual's concern for other individuals. Although it is possible to imagine a solitary individual who behaves as a practicing Christian, the value of Christianity (or Confucianism, or Buddhism, for that matter) is better seen in a community, where belief is expressed as each individual's concern for the rest. This concern, it seems to me, is implicit in all religious belief, even the most primitive, where, though its expression seems sometimes to be bizarre, it still acts to govern peoples' relationships, one to another.

This, I suppose, is the crux of my problem of explaining my beliefs in religious terms. Perhaps I erred in taking such pains to point out that I do not believe in the "standard notion" of God. I think my beliefs could be considered religious, in the sense I have just explained. I do not call myself religious, simply because most people then assume that I believe in God, in the conventional sense.

- V. "He said he believed in birth control but was uncertain whether birth control meant taking life; that he believed in preventive birth control and not in the interruption of gestation 'if it can be helped'."

Letter, page 3

Both my attorney and I were rather surprised by the questions Mr. Bradley asked me concerning my beliefs in connection with birth control. I was not exactly "uncertain" whether birth control meant taking life; I simply did not know what Mr. Bradley meant by "life". If he meant it in the legal sense, then interruption of gestation means "taking life," I suppose. If he meant it in the moral sense; whether or not it is "right" or "good" is a different matter. This question is considered by some people, and I am one of them, to admit no simple answer. Since my beliefs concerning birth control seem quite irrelevant to the questions at hand, I would rather not go into them here.

- VI. "The registrant stated that there should be no arms, even for defense or resistance to aggression, and even if another political force should take over the country."

Letter, page 3

Here, again, I don't quite understand the Justice Department. When it speaks of another political "force" taking over the country, does it mean the Republicans?

I presume that, when the Justice Department says "another political force", it means, "an enemy".

Again, perhaps, I did not make myself clear. When Mr. Bradley heard me say there should be no armies (and I say there should be no armies in exactly the same way that I would say that there should be no disease: I think ~~we~~ all can agree that things would be better if we could live without armies, just as we can agree that things would be better if none of us had to worry about cancer--and neither of these desirable circumstances will come of its own accord.), he assumed immediately that I meant "there should be no armies, even for defense or resistance to aggression..." (my stress). What I may not have made clear, perhaps, is that the sentence should read, "there should be no armies, because they do not constitute a vital defense, nor do they provide a permanent means of resisting aggression." You disagree. Naturally. But the point is not whether or not I am right; this we shall all learn in time. The point is that I am being asked (and "asked" is certainly not too strong a word) by my Government to join its army. If I disagree with my Government about whether or not a bridge should be built, or a school planned, or taxes raised, I can complain, vote, write letters to my Congressman--in short I can oppose what the Government is doing, and I am free to do so. If my opposition is unsuccessful I may even have to pay for the things I opposed. This is reasonable and it works fairly equitably in practice. The Government can take my money and use it in a way with which I disagree. But, in this case, the Government not only wants to take my money; it wants to take me, and use me in a way with which I profoundly disagree. And, it not

only wants to use me, but it wants me to agree to the bargain. Well I'm not really complaining, Gentlemen. I realize that the Government position seems reasonable. The Government needs people for its army and so it institutes some sort of procedure for getting them. And, in order to make things equitable, everybody is liable to be taken. I might even consider going to work for the Government, voluntarily, if I were convinced I was helping to make a better world. But, though the Government is, I believe, trying to improve life for us, in whatever ways Governments can improve life for people, I feel that I would be betraying my concern for others--that I would be betraying myself if I were to allow the Government to use me in its army.

It is not an easy thing to say "No; I won't go," when others are going--and some are dying. It may seem strange to say, but I would be betraying them, too, if I agreed to let my Government use me. I, too, want to see a peaceful world. But armed "defense" will not create that world. People will create that world if it is to be created at all. If we kill in the cause of peace, we may gain peace, eventually, but will we be around to enjoy it?

VII. "He reiterated that he did not believe in taking a human life but that he did not see it as a moral or religious wrong but simply as a social 'error' or illogical act."

I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed Mr. Bradley was using the word "religious" in the conventional sense, and, in order to be perfectly honest did not characterize my belief as "religious." I do believe the taking of life--anyone's life--to be morally wrong. It is not anyone's business to take anyone's life.

I do not believe I could ever find myself in circumstances where I could take anyone's life.

To summarize, I would like to reiterate that, though my beliefs are not religious in the conventional sense of my deriving the authority for such beliefs from a belief in God, they are certainly religious in the ethical sense of the word: that, though I don't believe the "force" outside of men is an entity, I do certainly believe in a force beyond men's control, the "force of circumstance," if you will. In addition, I would like to ask you about my "burden of proof," mentioned in the Letter of the Attorney General. I seem to be having a difficult time proving that I am what I am, at least in the eyes of the Justice Department. Proving that one believes as one believes seems a somewhat arduous task and I would appreciate it, therefore, if the Chairman of the Appeal Board could furnish me with some sort of outline or guide to the nature of this proof. I am not trying to make fun of the Board; I would simply, like to know how best to make my concern as a Conscientious Objector known to you. Other than describing myself and my beliefs as best I can, I can, at this time, offer no more.

Thank you for your consideration.

Sincerely,

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Subj: Request for postponement of induction of Elliot Welsh

Mr. Welsh has been employed by Kett Engineering Corporation since September 1965 as a Mathematician and a Scientific Computer Programmer.

His specific assignment involves the entire responsibility for the scientific programming of a computer which is utilized as a turbojet engine analyser of several military aircraft which are being utilized in Viet-Nam at this time.

He is making full utilization of his college training plus his specialized training in scientific computer programming which he received at the International Tabulating Institute. Because he has had sole responsibility for this vital project, it is imperative that he be permitted to continue until the project is completed. This will take a minimum of 120 days from this date.

It is completely impractical to replace him within any reasonable period of time even if a technically competent substitute could be found because he has been handling the entire phase of the project. Any attempt to replace him would of necessity cause a delay in the successful completion of this project, which is directly related to the conflict in Viet-Nam.

Due to the urgency of this situation, please contact us by phone at EX 3-9714 or at 920 Santa Monica Blvd., Santa Monica, California so that we can notify the military contracting officer of the results of this request.

Cliff Petersen
Cliff Petersen
President & Security Officer

KETT ENGINEERING CORPORATION

cc: Air Force Contract Administrator

12/1/65
Sinead
Mr. Marshall
Mr. Gaskin

ARMED FORCES SECURITY QUESTIONNAIRE

I.—EXPLANATION

1. The interests of National Security require that all persons being considered for membership or retention in the Armed Forces be reliable, trustworthy, of good character, and of complete and unswerving loyalty to the United States. Accordingly, it is necessary for you to furnish information concerning your security qualifications. The answers which you give will be used in determining whether you are eligible for membership in the Armed Forces, in selection of your duty assignment, and for such other action as may be appropriate.

2. You are advised that in accordance with the Fifth Amendment of the Constitution of the United States you cannot be

compelled to furnish any statements which you may reasonably believe may lead to your prosecution for a crime. This is the only reason for which you may avail yourself of the privilege afforded by the Fifth Amendment in refusing to answer questions under Part IV below. Claiming the Fifth Amendment will not by itself constitute sufficient grounds to exempt you from military service for reasons of security. You are not required to answer any questions in this questionnaire, the answer to which might be incriminating. If you do claim the privilege granted by the Fifth Amendment in refusing to answer any question, you should make a statement to that effect after the question involved.

II.—ORGANIZATIONS OF SECURITY SIGNIFICANCE

1. There is set forth below a list of names of organizations, groups, and movements, reported by the Attorney General of the United States as having significance in connection with the National Security. Please examine the list carefully, and note those organizations, and organizations of similar names, with which you are familiar. Then answer the questions set forth in Part IV below.

2. Your statement concerning membership or other association with one or more of the organizations named may not, of itself, cause you to be ineligible for acceptance or retention in the

Armed Forces. Your age at the time of such association, circumstances prompting it, and the extent and frequency of involvement, are all highly pertinent, and will be fully weighed. Set forth all such factors under "Remarks" below, and continue on separate attached sheets of paper if necessary.

3. If there is any doubt in your mind as to whether your name has been linked with one of the organizations named, or as to whether a particular association is "worth mentioning," make a full explanation under "Remarks."

Organizations designated by the Attorney General, pursuant to Executive Order 10450, are listed below:

Communist Party, U. S. A., its subdivisions, subsidiaries and affiliates.

Communist Political Association, its subdivisions, subsidiaries and affiliates, including—

Alabama People's Educational Association.
Florida Press and Educational League.
Oklahoma League for Political Education.
People's Educational and Press Association of Texas.
Virginia League for People's Education.

Young Communist League.

Abraham Lincoln Brigade.

Abraham Lincoln School, Chicago, Illinois.

Action Committee to Free Spain Now.

American Association for Reconstruction in Yugoslavia, Inc.

American Branch of the Federation of Greek Maritime Unions.

American Christian Nationalist Party.

American Committee for European Workers' Relief.

American Committee for Protection of Foreign Born.

American Committee for the Settlement of Jews in Birobidjan, Inc.

American Committee for Spanish Freedom.

American Committee for Yugoslav Relief, Inc.

American Committee to Survey Labor Conditions in Europe.

American Council for a Democratic Greece, formerly known as the Greek American Council; Greek American Committee for National Unity.

American Council on Soviet Relations.

American Croatian Congress.

American Jewish Labor Council.

American League Against War and Fascism.

American League for Peace and Democracy.

American National Labor Party.

American National Socialist League.

American National Socialist Party.

American Nationalist Party.

American Patriots, Inc.

American Peace Crusade.

American Peace Mobilization.

American Poles for Peace.

American Polish Labor Council.

American Polish League.

American Rescue Ship Mission (a project of the United American Spanish Aid Committee).

American-Russian Fraternal Society.

American-Russian Institute, New York (also known as the American Russian Institute for Cultural Relations with the Soviet Union).

American Russian Institute, Philadelphia.

American Russian Institute of San Francisco.

American Russian Institute of Southern California.

Los Angeles.

American Slav Congress.

American Women for Peace.

American Youth Congress.

American Youth for Democracy.

Armenian Progressive League of America.

Associated Klans of America.

Association of Georgia Klans.

Association of German Nationals (*Reichsdeutsche Vereinigung*).

Ausland-Organisation der NSDAP, Overseas Branch of Nazi Party.

Baltimore Forum.

Benjamin Davis Freedom Committee.

Black Dragon Society.

Boston School for Marxist Studies, Boston, Massachusetts.

Bridges-Robertson-Schmidt Defense Committee.

Bulgarian American People's League of the United States of America.

California Emergency Defense Committee.

California Labor School, Inc., 321 Divisadero Street.

San Francisco, California.

Carpatho-Russian People's Society.

Central Council of American Women of Croatian Descent (also known as Central Council of American Croatian Women, National Council of Croatian Women).

Central Japanese Association (*Beihoku Chuo Nipponjin Kai*).

Central Japanese Association of Southern California.

Central Organization of the German-American National Alliance (*Deutsche-Amerikanische Einheitsfront*).

Cervantes Fraternal Society.

China Welfare Appeal, Inc.

Chopin Cultural Center.

Citizens Committee to Free Earl Browder.

Citizens Committee for Harry Bridges.

Citizens Committee of the Upper West Side (New York City).

Citizens Emergency Defense Conference.

Citizens Protective League.

Civil Liberties Sponsoring Committee of Pittsburgh.

Civil Rights Congress and its affiliated organizations, including Civil Rights Congress for Texas.

Veterans Against Discrimination of Civil Rights Congress of New York.

Columbians.

Comite Coordinador Pro Republica Espanola.

Comite Pro Derechos Civiles.

Committee to Abolish Discrimination in Maryland.

Committee to Aid the Fighting South.

Committee to Defend the Rights and Freedom of Pittsburgh's Political Prisoners.

Committee for a Democratic Far Eastern Policy.

Committee for Constitutional and Political Freedom.

Committee for the Defense of the Pittsburgh Six.

Committee for Nationalist Action.

Committee for the Negro in the Arts.

Committee for Peace and Brotherhood Festival in Philadelphia.

Committee for the Protection of the Bill of Rights.

Committee for World Youth Friendship and Cultural Exchange.

Committee to Defend Marie Richardson.

Committee to Uphold the Bill of Rights.

Commonwealth College, Mena, Arkansas.

Congress Against Discrimination.

Congress of the Unemployed.

Connecticut Committee to Aid Victims of the Smith Act.

Connecticut State Youth Conference.

Congress of American Revolutionary Writers.

Congress of American Women.

Council on African Affairs.

Council of Greek Americans.

Council for Jobs, Relief, and Housing.

Council for Pan-American Democracy.

Croatian Benevolent Fraternity.

Dai Nippon Butoku Kai (Military Virtue Society of Japan or Military Art Society of Japan).

Daily Worker Press Club.

Daniels Defense Committee.

Dante Alighieri Society (Between 1935 and 1940).

Dennis Defense Committee.

Devon Youth Assembly.

East Bay Peace Committee.

Elsinore Progressive League.

Emergency Conference to Save Spanish Refugees (funding body of the North American Spanish Aid Committee).

Everybody's Committee to Outlaw War.

Families of the Baltimore Smith Act Victims.

Families of the Smith Act Victims.

Federation of Italian War Veterans in the U. S. A., Inc. (*Associazione Nazionale Combattenti Italiani, Federazione degli Stati Uniti d'America*).

Finnish-American Mutual Aid Society.

Florida Press and Educational League.

Frederick Douglass Educational Center.

Freedom Stage, Inc.

Friends of the New Germany (*Freunde des Neuen Deutschlands*).

Friends of the Soviet Union.

Garibaldi American Fraternal Society.

George Washington Carver School, New York City.

German-American Bund (*Amerikadeutscher Volksbund*).

German-American Republican League
German-American Vocational League (*Deutsche Amerikanische Berufshilfsvereine*)
Guardian Club

Harlem Trade Union Council
Hawaii Civil Liberties Committee
Hemlock Kai, also known as Nohoku Hews
Gomusha Kai, Zabel Nihonjin, Hevaku Gomusha Kai and Zabel Hemlock Kai (*Japanese Belonging to America Military Conscripts Association*)
Hellenic-American Brotherhood
Higashi Kai (*Imperial Japanese Reservists*)
Himmatsu Kai (*Rising Sun Flag Society—a group of Japanese War Veterans*)
Hokubei Zengo Shokai Dan (*North American Reserve Officers Association*)
Hollywood Writers Mobilization for Defense
Hungarian-American Council for Democracy
Hungarian Brotherhood

Isaho Pension Union
Independent Party (*Seattle, Washington*)
Independent People's Party
Industrial Workers of the World
International Labor Defense
International Workers Order, its subdivisions, subsidiaries and affiliates

Japanese Association of America
Japanese Overseas' Central Society (*Kaigai Doko Chuo Kai*)
Japanese Overseas Convention, Tokyo, Japan, 1940
Japanese Protective Association (*Reservist Organization*)
Jefferson School of Social Science, New York City
Jewish Culture Society
Jewish People's Committee
Jewish People's Fraternal Order
Jikyoku Lin Kai (*The Committee for the Crisis*)
Johnson-Forest Group
Johannes
Joint Anti-Fascist Refugee Committee
Joint Council of Progressive Italian-Americans, Inc.
Joseph Weydemeyer School of Social Science, St. Louis, Missouri

Kibei Seinen Kai (*Association of U. S. citizens of Japanese ancestry who have returned to America after studying in Japan*)
Knights of the White Camelia
Ku Klux Klan
Kyllhauser, also known as Kyllhauser League (*Kyllhauser Bund*), Kyllhauser Fellowship (*Kyllhauser Kameradschaft*)
Kyllhauser War Relief (*Kyllhauser Kriegsreliefwerk*)

Labor Council for Negro Rights
Labor Research Association, Inc.
Labor Youth League
League for Common Sense
League of American Writers
Luzon Society (*Italian Black Shirts*)

Macedonian-American People's League
Mato Mongolian Circle
Massive Labor Committee to Defend Al Lannon
Maryland Congress Against Discrimination
Massachusetts Committee for the Bill of Rights
Massachusetts Minnie Women for Peace (not connected with the Minnie Women of the U. S. A., Inc.)
Marine Braverman Defense Committee
Michigan Civil Rights Federation

Michigan Council for Peace
Michigan School of Social Science

Nanka Toshoku Guntadan (*Imperial Military Friends Group or Southern California War Veterans*)
National Association of Mexican Americans (*also known as American National Mexican-Americans*)
National Blue Star Mothers of America (not to be confused with the Blue Star Mothers of America organized in February 1942)

National Committee for the Defense of Political Prisoners

National Committee for Freedom of the Press
National Committee to Win Amnesty for Smith Act Victims

National Committee to Win the Peace
National Conference on American Policy in China and the Far East (*a Conference called by the Committee for a Democratic Far Eastern Policy*)

National Council of Americans of Croatian Descent
National Council of American-Soviet Friendship
National Federation for Constitutional Liberties

National Labor Conference for Peace
National Negro Congress

National Negro Labor Council
Nationalist Action League

Nationalist Party of Puerto Rico
Native Friends of America (*Since 1935*)

Negro Labor Victory Committee
New Committee for Publications

Nichibei Kogyo Kaisha (*The Great Fujii Theatre*)
North American Committee to Aid Spanish Democracy

North American Spanish Aid Committee
North Philadelphia Forum

Northwest Japanese Association

Ohio School of Social Sciences
Oklahoma Committee to Defend Political Prisoners
Oklahoma League for Political Education
Original Southern Klans, Incorporated

Pacific Northwest Labor School, Seattle, Washington

Palo Alto Peace Club

Partido del Pueblo de Panama (*operating in the Canal Zone*)

Peace Information Center

Peace Movement of Ethiopia

People's Drama, Inc.

People's Educational and Propaganda Association of Texas

People's Educational Association (*Incorporated under name Los Angeles Educational Association, Inc.*, also known as People's Educational Center, People's University, People's School)

People's Institute of Applied Religion

Peoples Program (*Seattle, Washington*)

People's Radio Foundation, Inc.

People's Rights Party

Philadelphia Labor Committee for Negro Rights

Philadelphia School of Social Science and Art

Photo League (*New York City*)

Pittsburgh Arts Club

Political Prisoners' Welfare Committee

Polonia Society of the IWO

Progressive German-Americans, also known as Progressive German-Americans of Chicago

Proletarian Party of America

Protestant War Veterans of the United States, Inc.

Provisional Committee of Citizens for Peace, Southwest Area

Provisional Committee on Latin American Affairs

Provisional Committee to Abolish Discrimination in the State of Maryland

Puerto Rican Comité Pro Libertad Civiles (CLC)

PuertoRicanos Unidos (*Puerto Ricans United*)

Quad City Committee for Peace
Queensbridge Tenants League

Revolutionary Workers League
Romanian-American Fraternal Society
Russian American Society, Inc.

Sakura Kai (*Patrons Society, or Cherry Association, composed of veterans of Russo-Japanese War*)

Samuel Adams School, Boston, Mass.

Santa Barbara Peace Forum

Schappes Defense Committee

Schneiderman-Darry Defense Committee

School of Jewish Studies, New York City

Seattle Labor School, Seattle, Washington

Serbian American Fraternal Society

Serbian Vidovdan Council

Shinto Temples (Limited to State Shinto abolished in 1945)

Silver Shirt Legion of America

Slavic Council of Southern California

Slovak Workers Society

Slovenian-American National Council

Socialist Workers Party, including American Committee for European Workers Relief

Sokoku Kai (*Fatherland Society*)

Southern Negro Youth Congress

Suiko Sha (*Reserve Officers Association, Los Angeles*)

Synagogue Women for Peace

Tom Paine School of Social Science, Philadelphia, Pennsylvania

Tom Paine School of Westchester, New York

Trade Union Committee for Peace

Trade Unionists for Peace

Tri-State Negro Trade Union Council

Ukrainian-American Fraternal Union

Union of American Croicians

Union of New York Veterans

United American Spanish Aid Committee

United Committee of Jewish Societies and Landsmanschaft Federations, also known as Coordination Committee of Jewish Landsmanschaften and Fraternal Organizations

United Committee of South Slavic Americans

United Defense Council of Southern California

United Harlem Tenants and Consumers Organization

United May Day Committee

United Negro and Allied Veterans of America

Veterans Against Discrimination of Civil Rights Congress of New York

Veterans of the Abraham Lincoln Brigade

Virginia League for People's Education

Voice of Freedom Committee

Walt Whitman School of Social Science, Newark, New Jersey

Washington Bookshop Association

Washington Committee to Defend the Bill of Rights

Washington Committee for Democratic Action

Washington Commonwealth Federation

Washington Pension Union

Wisconsin Conference on Social Legislation

Workers Alliance (*since April 1936*)

Yugoslav Kultur Verband

Yugoslav-American Cooperative Home, Inc.

Yugoslav Seamen's Club, Inc.

III.—INSTRUCTIONS

1. Set forth an explanation for each answer checked "Yes" under question 2 below under "Remarks." Attach as many extra sheets as necessary for a full explanation, signing or initialing each extra sheet.

2. Title 18, U. S. Code, Section 1001, provides, in pertinent part: "Whoever . . . falsifies, conceals or covers up . . . a material fact, or makes any false . . . statements" . . . or makes or uses any false writing . . . shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both." Any false, fraudulent or fictitious response to the questions under Part IV below may give rise to criminal liability under Title 18.

U. S. C., Section 1001. You are advised, however, that you will not incur such liability unless you supply inaccurate statements with knowledge of their untruthfulness. You are therefore advised that before you sign this form and turn it in to Selective Service or military authorities, you should be sure that it is truthful, that detailed explanations are given for each "Yes" answer under question 2 of Part IV below, and that details given are as full and complete as you can make them.

3. In stating details, it is permissible, if your memory is hazy on particular points, to use such expressions as, "I think," "in my opinion," "I believe," or "to the best of my recollection."

IV.—QUESTIONS

(For each answer checked "Yes" under question 2, set forth a full explanation under "Remarks" below)

		YES	NO			YES	NO
1. I have read the list of names of organizations, groups, and movements set forth under Part II of this form and the explanation which precedes it.		<input checked="" type="checkbox"/>	<input type="checkbox"/>	j. Have you ever contributed money to any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
2. Concerning the list of organizations, groups and movements set forth under Part II above:				k. Have you ever contributed services to any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
a. Are you now a member of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	l. Have you ever subscribed to any publication of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
b. Have you ever been a member of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	m. Have you ever been employed by a foreign government or any agency thereof?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
c. Are you now employed by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	n. Are you now a member of the Communist Party of any foreign country?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
d. Have you ever been employed by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	o. Have you ever been a member of the Communist Party of any foreign country?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
e. Have you ever attended any meeting of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	p. Have you ever been the subject of a loyalty or security hearing?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
f. Have you ever attended any social gathering of any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	q. Are you now or have you ever been a member of any organization, association, government, group or combination of persons listed on the Attorney General's list which advocates the overthrow of our constitutional form of government, or which has adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?		<input type="checkbox"/>	<input checked="" type="checkbox"/>
g. Have you ever attended any gathering of any kind sponsored by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>			<input type="checkbox"/>	<input checked="" type="checkbox"/>
h. Have you prepared material for publication by any of the organizations, groups, or movements listed?		<input type="checkbox"/>	<input checked="" type="checkbox"/>			<input type="checkbox"/>	<input checked="" type="checkbox"/>
i. Have you ever corresponded with any of the organizations, groups, or movements listed or with any publication thereof?		<input type="checkbox"/>	<input checked="" type="checkbox"/>	r. Have you ever been known by any other last name than that used in signing this questionnaire?		<input type="checkbox"/>	<input checked="" type="checkbox"/>

REMARKS

Refused

John

REMARKS (Continued)

I have this date, 8 DEC 65, reviewed the contents of DD Form 98 prepared by myself on 30 APR 64 and certify that the statements then made by me are at this time full, true, and correct.

Signature of Witnessing Officer

Signature

CERTIFICATION

In regard to any part of this questionnaire concerning which I have had any question as to the meaning, I have requested and have obtained a complete explanation. I certify that the statements made by me under Part IV above and on any supplemental pages hereto attached, are full, true, and correct.

TYPED FULL NAME OF PERSON MAKING CERTIFICATION	SERVICE NUMBER (if any)	SIGNATURE OF PERSON MAKING CERTIFICATION
		<i>Edward Ashton Walker</i>
TYPED NAME OF WITNESS	DATE	SIGNATURE OF WITNESS
A. EPPLEY, Capt, USMC Deputy CO, Exam & Ind Station	30 APR 1964	<i>[Signature]</i>

DEFENDANT'S EXHIBIT 3

"religion".

Registrant states that he is absolutely opposed to the use of force in human affairs.

CONCLUSION

The hearing officer believes that this young man is sincere in his convictions as expressed to the hearing officer. However, his ideas are somewhat incomplete. In other words, as registrant admits, his ideas are still in the process of formulation. In addition to the questions on euthanasia and birth control, his ideas of when and under what circumstances force could be used (for example the question of a policeman apprehending a criminal) were not well explained or made clear. He reiterated faithfully that he does not believe in the taking of human life. But he does not see this as a moral or religious wrong but simply as a social "error" or as an act which is illogical. He does not believe in any continuation of human existence after death, he does not believe in a God or in any other being or entity outside of man which has any authority over men. He does not believe in any system of ethics or in a set of prescribed rules of human conduct except to the extent that he feels some things are "right" and some things are "wrong" such as killing, stealing, adultery and the like. But his authority for these beliefs is that they are "laws of being" which are tantamount to a conscience in each individual. But registrant denies any religious beliefs or authority for these thoughts.

The hearing officer could find no religious basis for the registrant's beliefs, opinions and convictions. Under these circumstances it is believed that registrant does not come within the provisions of Section 6(j) of the Act.

RECOMMENDATION

The hearing officer considers that it would be appropriate for the Department of Justice to recommend to the Appeal Board that the registrant's claim for exemption should be denied both as to combatant and non-combatant service.

Dated this 15th day of July, 1965.

Owen J. Brady

Special Hearing Officer

TRIAL TESTIMONY OF PETITIONER

Q. Recite to us what happened just before you announced that you were not going to submit to induction?

A. Well, we were in a large room filling out forms at a table, a number of tables, and there were two army people there. I don't know what their ranks were. They weren't wearing anything on their shoulders, and they were having everyone fill out insurance forms and what have you I believe.

We weren't given time to read the forms. We came to a form that I didn't sign, couldn't sign, because he's asking me to sign—they were asking me to sign something I didn't feel I could sign, and I raised my hand to indicate that I had a question about this form, and the gentleman

asked me to step around to a corner of the room and talk to another gentleman who asked me what was the matter, and I told him that I couldn't sign the form because there's some things that had changed.

And he said to me, "Well, are you going to refuse induction," and I said, "Yes."

And he said, "Well, do you want to be a fucking murderer about it." And I said, "No." And then he said, "Well, stand over in the next room and wait."

And so I stood over in the next room and waited for I imagine forty-five minutes or so. Meanwhile there were several other officers coming and going and they were evidently trying to decide what to do with me.

At least a Marine Captain, I believe his name was DeLano, came in and took me up to an office. I believe it's on the second or third floor. And he said he was waiting for another officer and so we waited and we talked a little bit and finally, apparently, the other officer hadn't come and he said, "Well now, you are going to—I'm going to ask you to step forward for induction," something like this. And he called another man into the room who was a typist or secretary, outside clerk I guess, and he asked me to stand up and he was sitting at his desk, and he said, "You are about to enter the armed forces of the United States, and when you take one step forward that step constitutes your entry into the armed forces of the United States."

That may not be the exact words but I think it's pretty close and I stood there and he repeated this once again,

and I stood there and he excused the person he had called into witness this.

I believe this man's name was Larson. Then he asked me to sign a paper, and he said, "Either sign a statement or write the following words. Being aware of my rights under the 5th Amendment, I have no statement to make at this time. And make three copies of it." And I made three copies of that last statement, "Being aware of my rights and under the 5th Amendment, I have no statement to make at this time," and I signed it. And he said, "Then you will be free to go," and so I left.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ELLIOTT ASHTON WELSH, II,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21,442

[September 23, 1968]

Appeal from the United States District Court
for the Central District of California

Before: **HAMLEY** and **ELY**, Circuit Judges, and **POWELL**,
District Judge

POWELL, District Judge:

This appeal is from a conviction of the appellant for refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462. This Court has jurisdiction under Rule 37 of Federal Rules of Criminal Procedure and 28 U.S.C. §1291.

The appellant Welsh registered with his local board on February 2, 1960. On December 11, 1961 the board received his completed classification questionnaire (SSS Form 100). He did not then claim to be a conscientious objector.

On December 14, 1961 the board classified the appellant I-A. On January 15, 1963 the board received appellant's application for a permit to leave the United States. The application stated that the appellant's classification was I-A. On February 5, 1963 the board issued a permit

allowing the appellant to depart for a period of one year, which expired March 16, 1964. On March 27, 1964 the appellant was ordered to report for a physical examination. On April 10, 1964 appellant requested and was given a special form for conscientious objector (SSS Form 150). It was completed and received by the board on April 24, 1964. In that form the appellant stated that he was "by reason of * * * belief, conscientiously opposed to participation in war in any form."¹ The appellant had altered the statement in the form by striking out the words "my religious training and" so that the statement read as above. He answered the question, "Do you believe in a Supreme Being?" by putting an X in the box marked "No".² He attached a note explaining the nature of his beliefs.

On May 12, 1964 the appellant's local board classified him I-A-O, and on May 25, 1964 the appellant sent the local board a letter amending his SSS Form 150 to request classification as I-O. He claimed exemption from both combatant and non-combatant training and service and requested a personal appearance.

He appeared before the local board on June 9. On June 10 the board informed appellant that he was still classified I-A-O. On June 19, 1964 the board received a letter in which appellant stated he was appealing to the Appeal Board from the refusal to classify him as I-O.

On July 28, 1964 the Appeal Board tentatively determined the appellant should not be classified I-O or any lower class.

On November 15, 1965 the appellant's file was returned by the Appeal Board which classified appellant I-A

1. Plaintiff's Exhibit 1, at 17.

2. *Id.*

by a vote of 3-0. On November 22, 1965 the board mailed the appellant an order to report for induction on December 8, 1965. He reported to the induction center and refused to step forward when his name was called, thereby manifesting his refusal to submit to induction. This prosecution followed.

The appellant raises principal questions as follows:

1. Was the Selective Service System's denial of a conscientious objector classification to appellant without basis in fact and arbitrary, capricious and contrary to law?
2. Were the report and recommendation of the hearing officer and the Department of Justice to the Appeal Board arbitrary, capricious and illegal because based upon unlawful standards?
3. Was the appellant denied a fair hearing before the local board because the board gave appellant too short a hearing or failed to pass upon his eligibility for I-O classification?
4. Was the appellant denied a fair hearing before the Appeal Board in that neither he nor the Appeal Board was given the full report of the FBI or of the hearing officer made to the Department of Justice?
5. Was the appellant denied due process by the induction station's failure to give him an opportunity to complete DD Form 98, Armed Forces Security Questionnaire, as required by the regulations?
6. Did the local board thwart appellant's timely presentation of his request for classification as III-A based on his wife's pregnancy and thus deny him due process of law?

I

Appellant claims that the Appeal Board denial of I-O and I-A-O classifications was without any basis in fact. He also contends that insofar as the Appeal Board decision rested upon the "Supreme Being" clause of section 6(j)³ it is premised upon an unconstitutional distinction between theistic and nontheistic religious beliefs.

In *Seeger v. United States*, 380 U.S. 163, 176 (1965) the Supreme Court explicitly adopted the following test for evaluating conscientious objector claims:

"A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."

A determinative question posed by application of the *Seeger* test to the facts of this case is whether the sufficiency of a registrant's beliefs is to be measured by strength or source or both.⁴ Unquestionably strength of belief (or sincerity) is an accepted criterion for judging conscientious objector claims. See *Seeger v. United States*, *supra*, at 185; *Dickinson v. United States*, 346 U.S. 389, 396 (1953). The court in *Seeger* also noted, apparently with approval, that:

"* * * The section excludes those persons who disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. * * *" *Seeger v. United States*, *supra*, at 173.

This quotation obviously contemplates a test based on the source of a registrant's beliefs. The belief is the same for

3. Universal Military Training and Service Act, § 6(j), 50 U.S.C. App. § 456(j). The "Supreme Being" clause was omitted from the recent reenactment of the draft law. Military Selective Service Act of 1967, § 7, 81 Stat. 101.

both philosophical and religious objectors, that it is wrong to participate in war.

The government concedes that appellant's beliefs are held with the strength of more traditional religious convictions. But appellant constantly declared that his beliefs stemmed from sociological, economic, historical and philosophical considerations. He denied that his objection to war was premised on religious belief. The Appeal Board was entitled to take him at his word, as he failed to meet the statutory standard, and to deny his request to be so classified.

Appellant next urges us to adopt the well reasoned opinion of Judge Kaufman in *Seeger v. United States*, 326 F.2d 846 (2d Cir. 1964), *rev'd*, 380 U.S. 163 (1964). That Circuit Court opinion held that the "Supreme Being" clause of section 6(j) unconstitutionally discriminated between theistic and nontheistic religious beliefs, 326 F.2d at 852-855. But in our case the Department of Justice recommendation quoted the test given above from *Seeger*, 380 U.S. 173. The facts and result of *Seeger* at the Supreme Court level lead to only one conclusion: the Supreme Court deleted the "Supreme Being" clause from the statute, as Mr. Justice Douglas observed "in the candid service of avoiding a serious constitutional doubt." Concurring opinion of Douglas, J., *United States v. Seeger*, 380 U.S. at 188 (1965), quoting from *United States v. Rumely*, 345 U.S. 41, 47 (1953). We see no need to consider the constitutionality of this clause because it was already *sub silentio* stricken from the statute and was so considered by the Department of Justice in this case.

The hearing officer found "no religious basis for the registrant's conscientious objector claim."⁴ His conclusion

4. Plaintiff's Exhibit 1, at 42.

was accepted by the Department of Justice which recommended that the Appeal Board deny appellant's claim for I-O classification. Appellant contends that this recommendation was bottomed on artificial and unlawful standards. In support of this contention appellant relies upon the following observations of the hearing officer: Appellant had not formulated an opinion on euthanasia; he had not formulated an opinion on birth control and, more precisely, upon the question of when life begins in the womb; appellant did not believe in life after death; he did not believe in God or any other entity with authority over man.

A Department of Justice recommendation premised upon an error of law vitiates an Appeal Board classification. *Sicurella v. United States*, 348 U.S. 385, 392 (1955). In *Shepherd v. United States*, 217 F.2d 942, 946 (9th Cir. 1954), the hearing officer concluded that Shepherd's willingness to participate in theocratic warfare negated his claim of conscientious objection. This court held this conclusion was wrong as a matter of law and reversed Shepherd's conviction. In *Bradley v. United States*, 218 F.2d 657, 663 (9th Cir. 1954), *rev'd on other grounds*, 348 U.S. 967 (1955), the hearing officer observed that Bradley believed in using force in self-defense. But the hearing officer did not conclude that this fact negated Bradley's claim. The court distinguished between a legally insufficient adverse conclusion and mere observation of facts which, had they led to an adverse conclusion, would have been legally insufficient to support it. *Bradley v. United States*, *supra*, at 663, n. 9. The observations upon which appellant relies were only observations of fact. We assume, *arguendo*, that none of them necessarily negates appellant's claim for conscientious objector classification. See *Seeger v. United States*, 380 U.S. 163 (1965). But the hearing officer did not conclude that these observations negated appellant's claim.

The distinction drawn in *Bradley v. United States*, *supra*, between observations of fact and conclusion of law, controls.

Appellant also suggests that these observations were improper. But appellant altered the Special Form for Conscientious Objectors, denying a religious basis for his beliefs and denying belief in a Supreme Being. These alterations raised uncertainty about the "religious" quality of his beliefs. The purpose of the hearing officer's inquiry is to explore uncertainties. *MacMurray v. United States*, 330 F.2d 928, 932 (9th Cir. 1964). How can the hearing officer proceed without inquiring into the application of a registrant's beliefs to ethical, religious, moral and philosophical problems? And what function would the inquiry serve if a registrant's answers could not be transmitted through the Department of Justice to the Appeal Board?

Appellant contends that he was denied a fair hearing before the local board. Specifically, he contends that his personal appearance was too short and that the local board failed to pass upon his eligibility for I-O classification.

When appellant appeared before the local board he declared that he felt his classification should be I-O rather than I-A-O. The reasons for this request, he said, were detailed in his letter of May 25, 1964 (which also contained his request for personal appearance and notice of appeal). He made no attempt to present additional material to the board. Selective Service Regulation 1624.2(B), 32 C.F.R. § 1624.2(b), affords a registrant the opportunity to present "further information." But no regulation requires a board to question a registrant when he says his position has already been stated. Appellant's hearing was short because he had nothing further to say.⁵

5. "I appeared before the board to answer questions about my appeal and to explain my position in the light of those answers.

No unfairness appears in this respect. See *Martin v. United States*, 190 F.2d 775, 778-779 (4th Cir.), cert. den., 342 U.S. 872 (1951).

Appellant's contention that the local board failed to pass upon his I-O claim is based upon a letter he wrote after his personal appearance. In that letter he states: "Then one of the board members said 'we don't have authority to pass upon his classification. It will have to go to the Appeal Board.'"⁶ If this statement was made as quoted the board member was mistaken. Selective Service Regulations contemplate a decision by the local board following personal appearance of a registrant. 32 C.F.R. § 1624.2(c). Failure to render a decision vitiates a later classification by the Appeal Board. *Knox v. United States*, 200 F.2d 398 (9th Cir. 1952). But it does not appear that this statement was made as quoted. In his letter appellant continues: "This quotation is as close as I can recall. A secretary was transcribing the conversation so the statement should be a matter of record."⁷ The "record" to which appellant refers states: "Registrant was informed that since he has appealed the I-A-O classification, his file would go to the Appeal Board and they would investigate to determine whether or not he qualifies for a I-O classification."⁸ There is no reference to local board jurisdiction, nor any explicit statement that the board would not render a decision. The record is consistent with the probability that the board was informing appellant that his claim was being denied. In fact this appears to be what happened, for the next day appellant received a new notice

I asked whether any members of the board had any questions about my appeal. They had none." Appellant's letter of June 18, 1964, Plaintiff's Exhibit 1, at 31-32.

6. *Id.* at 32.

7. Plaintiff's Exhibit 1, at 32.

8. Plaintiff's Exhibit 1, at 29.

of classification from the local board informing him that he was being retained in class I-A-O.⁹ This case is distinguishable from *Knox v. United States, supra*; the presumption of regularity which was overcome in that case governs here.

Appellant contends he was denied a fair hearing before the Appeal Board because neither the Appeal Board nor appellant was provided with the full report of the FBI investigation or the full report of the hearing officer.

We think appellant's contention directed to the Department of Justice's refusal to provide him with a full copy of the FBI investigative report is without merit. In *United States v. Nugent*, 346 U.S. 1, 5 (1953), the Court held:

"* * * We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitled them to no guarantee that the FBI reports must be produced for their inspection. * * *"

Appellant attempts to distinguish *Nugent* because the registrant in that case did not request a copy of the report. This factor was noted by the Court. *United States v. Nugent, supra*, at 7, n. 10. But as the quotation above indicates the Supreme Court did not so restrict its decision. Nor can we see any reason why it should be so restricted.

To refute appellant's contention that the entire FBI record should have been forwarded to the Appeal Board it is only necessary to advert to the identical circumstance in *United States v. Nugent, supra*, at 7, n. 10.

The same rationale applies to appellant's complaint about the Department of Justice's failure to provide either

9. The notice of classification is not mailed until a decision to reclassify or to deny reopening is reached by the board. 32 C.F.R. § 1624.2(d).

appellant or the Appeal Board with the hearing officer's full report. The analogy is strengthened by appellant's presence at the hearing and his consequent knowledge of what transpired there. This knowledge largely obviates the objections to the majority opinion in *Nugent* expressed by Mr. Justice Douglas in dissent. Contentions identical to those made by appellant were considered in *DeRemer v. United States*, 340 F.2d 712, 715-717 (8th Cir. 1965). Drawing upon the body of administrative law, and especially considering the unavailability of intra-agency memoranda, the court rejected these contentions. So do we.

Appellant contends his reply to the Department of Justice recommendation, supplied by him in accordance with 32 C.F.R. § 1626.25(e), was never placed before the Appeal Board and that this procedural irregularity vitiated the classification process. He testified:

"I took the rebuttal to the Appeal Board. * * * [F]inally a clerk came out of her room, and she asked me what I wanted, and I said that I had the letter for the—letter of rebuttal to the Attorney General's letter for the Appeal Board. She said, 'Oh, yes, * * *'. And she said, 'Well, I'll see that the Board gets a summary of this letter.' And I said, 'You mean they don't see the letter.' And she said, 'Well, they could if they wanted but they usually don't have a great deal of time and they usually read the summary.'" Record, Vol. 2, at 23.

"It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown." *Lewis v. United States*, 279 U.S. 63, 73 (1929) (alternative holding). *Keene*

v. *United States*¹⁰ explained the foundation of this presumption:

"The presumption which attends these proceedings [local board level] is founded in the policy of the law, and is derived from the faith and credit we owe to official acts of duly constituted authority. As such, it is legally sufficient to sustain the burden of regularity and validity until dissipated by some probative evidence to the contrary."

See also, 9 Wigmore, *Evidence* §§ 2490, 2491 (3rd Ed. 1940); ALI *Model Code of Evidence*, Rule 704, Introductory Note to Chap. VIII (presumptions), Morgan, Forward at 52-65 (1942). There is no showing that the Appeal Board did not receive or consider appellant's letter. This is merely an inference which might, but need not, be drawn. As such, it is insufficient to overcome the presumption of regularity. *Keene v. United States*, *supra*, note 10.

II

Before being given an opportunity to submit to induction appellant was asked to re-execute his Armed Forces Security Questionnaire, DD Form 98. He stated that some of the answers he gave the year before would no longer be correct and refused to re-execute the form. AR 601-270, ch. 4, § II, para. 80(b)(2) at 4-7 (1965) declares that a registrant who refuses to execute DD Form 98 will "not be inducted into the Armed Forces pending

10. 266 F.2d 278, 280 (10th Cir. 1959). Keene contended that the board which classified him acted without a quorum. A board or panel thereof consists of three or more members. 50 U.S.C. App. § 460(b)(3). A majority of the members of the board or panel constitutes a quorum. 32 C.F.R. § 1604.52a(d). The vote which classified Keene was 2-0. Another vote, four years later, was 4-0. If the number of board members had not changed (and there was no evidence on this point either way) the initial vote was taken without a quorum. The court recognized that lack of a quorum might be inferred, but held this evidence insufficient to overcome the presumption of regularity.

completion of a thorough investigation." The investigative process is detailed in AR 604-10, § III, para. 18 (1959); 604-10, §§ IV, V (1959). Rather than delay appellant's induction pending investigation, induction station personnel ordered him to step forward. Appellant now contends that this procedural irregularity vitiates the command to step forward and, therefore, his conviction. We cannot agree.

The rule is well established that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Know v. United States*, 200 F.2d 398, 401 (9th Cir. 1952). See *Edwards v. United States*, _____ F.2d _____ (9th Cir., May 10, 1968). Appellant did not offer to prove that an investigation by military intelligence would have uncovered evidence that he was a security risk.

None of the factors which have led us to presume prejudice from procedural omissions are present in this case. Comparison of appellant's contentions with our decision in *Briggs v. United States*, _____ F.2d _____ (9th Cir. June 26, 1968) will illustrate the absence of these factors. In *Briggs*, induction station personnel denied the registrant a physical inspection required by AR 601-270, ch. 3, III, para. 69 (1965). We presumed prejudice and reversed. A registrant's failure to take physical examinations precludes him from challenging his classification; he is said to have failed to exhaust his administrative remedies. See the discussion of *Falbo v. United States*, 320 U.S. 549 (1944) in *Estep v. United States*, 327 U.S. 114, 123 (1946). The Army's refusal to give a physical inspection should bear equivalent consequences.

Execution of DD Form 98 has not been held to be an administrative remedy which the registrant must exhaust.

Also, a medical deferment is granted at least partially for the benefit of the individual registrant. But rejection by the Army for security reasons, like rejection for felony conviction, is wholly for the benefit of the Army and may be waived. See *Nickerson v. United States*, 391 F.2d 760, 762-63 (10th Cir. 1968); *Bjorson v. United States*, 272 F.2d 244, 249 (9th Cir. 1959), *cert. den.*, 362 U.S. 949 (1960), *overruled in part and on other grounds in Daniels v. United States*, 372 F.2d 407, 414 (9th Cir. 1967); *Korte v. United States*, 260 F.2d 633, 637 (9th Cir. 1958), *cert. den.*, 358 U.S. 928 (1959).

The overriding objective of selective service is "to raise an army speedily and efficiently." *Falbo v. United States*, *supra* at 553. But appellant would have us presume prejudice from the Army's refusal to conduct a useless investigation of his political and social background. Without a real showing of prejudice there is no reason to require such a waste of military intelligence resources. Nor should any obstinate inductee be given an opportunity to delay his induction for possibly months by refusing to execute the security questionnaire.

III

Appellant claims that he should have been granted a III-A (dependency) deferment. He argues that proper presentation of his request for this deferment was thwarted by the local board clerk. Appellant testified that he visited his local board to inform it that he had moved and that his wife was pregnant and that he and his wife had made an appointment with a doctor to confirm the pregnancy. He further testified:

"When I asked if I could give the board more information than I had given them, I had filled out an ad-

dress, change of address form, the clerk said to me, 'What is your classification?' I said 'my classification is I-A-O.' The clerk then said 'If we want any more, if we want any more information from you, we'll send you a form.'

Q. Did that form ever come?

A. No sir." Record, Vol. 2 at 19

This evidence does not support appellant's contention that assertion of a III-A claim was thwarted by the clerk. Nowhere does it appear that appellant told the clerk his wife was pregnant. It is probable that the clerk thought appellant was referring to further evidence in support of his I-A-O classification (conscientious objector available for non-combatant duty). Because appellant had already received this classification, to the best of the clerk's knowledge additional supporting information was unnecessary. As appellant relates it, although he was thinking of his wife's pregnancy, he spoke to the clerk only generally of "more information." It was appellant's duty to request the III-A deferment in writing accompanied by a doctor's certificate. 32 C.F.R. §§ 1625.2 (writing), 1622.30(c)(3) (certificate of pregnancy). The requirement of a writing is mandatory and must be followed if the deferment is to be granted. *Shaw v. United States*, 264 F.2d 118, 119-120 (9th Cir. 1959).

Appellant submitted with his brief evidence of his present III-A status.¹¹ While this provides appellant with a present deferment, it has no bearing on the validity of his I-A classification at the time he refused to submit to induction. *Cox v. United States*, 332 U.S. 442, 454

11. Appendix B to Appellant's Opening Brief.

(1947); *Gatchell v. United States*, 378 F.2d 287, 292 (9th Cir. 1967).

Affirmed.*

HAMLEY, Circuit Judge (dissenting):

As stated in the majority opinion, the Hearing Officer found "no religious basis for the registrant's conscientious objector claim." His conclusion was accepted by the Department of Justice as the basis for its recommendation to the Appeal Board that Welsh's claim for a I-O or I-A-O classification be denied. The Appeal Board implicitly followed that recommendation in denying either of these classifications. The majority holds that, under the circumstances of this case, there was no judicially cognizable administrative error in this regard which undermines the conviction. I respectfully disagree.

In reaching its conclusion, the majority addresses itself to two questions: (1) was the Appeal Board's denial of I-O or I-A-O classifications without any basis in fact? and (2) does the Appeal Board decision rest upon an unconstitutional distinction between theistic and non-theistic

*Note: The dissenting opinion of Judge Hamley, while based on other grounds, mentions the possible unconstitutionality of the "religious training and belief" provision of section 6(j) of the Act. The majority feels that since it was not listed as one of the questions presented in appellant's opening brief or argued there it does not require comment in the majority opinion. The only error claimed is the denial of the motion for judgment of acquittal and this question was not presented in that motion.

The majority feels that any application for relief under 28 U.S.C. § 2255 on this ground would find no support in this record and would be met by the prior holdings of this court sustaining the religious exemption against Establishment Clause attack: *Etcheverry v. United States*, 320 F.2d 873, 874 (9th Cir.), cert. den., 375 U.S. 930 (1963), reh'r den., 375 U.S. 989, 376 U.S. 939 (1964), 380 U.S. 926 (1965); *Clark v. United States*, 236 F.2d 13, 23-24 (9th Cir.), cert. den., 352 U.S. 882, reh'r den., 352 U.S. 937 (1956) *George v. United States*, 196 F.2d 445, 450-452 (9th Cir.), cert. den., 344 U.S. 843 (1952).

religious beliefs? The majority gives a negative answer to both of these questions.

Concerning the second question, I agree with the majority holding, and for the reasons stated in the majority opinion. The Appeal Board decision is not premised upon the "Supreme Being" provision of section 6(j). The Department of Justice report, on the basis of which the Appeal Board acted, noted that, under *Seeger v. United States*, 380 U.S. 163, the term "Supreme Being" was given such a broad reading that, in effect, it added nothing to the "religious training and belief" clause.

But the majority has failed to discuss another facet of the constitutional question, namely whether, apart from the "Supreme Being" clause, in predicating its decision on the "religious training and belief" clause of section 6(j), the Appeal Board violated the Establishment of Religious Clause of the First Amendment.

In my opinion this latter question is clearly presented on this appeal because it is inherent in any attack upon the statute predicated upon the Establishment of Religion Clause of the First Amendment. Thus it is immaterial that, in his opening brief, Welsh did not discuss this precise issue other than to point out that the sincerity of his conscientious objection was not only established by the undisputed evidence, but was conceded by the Hearing Officer.

Defendant naturally concentrated his attention in that brief on the broad reading which *Seeger* gave the Supreme Being and religious training and belief clauses of the statute. If he prevailed on that argument he did not need a ruling that the statute was unconstitutional as applied, just as the Supreme Court, in *Seeger*, avoided the constitutional issue by giving the statute a broad reading. But

there was implicit in defendant's presentation his underlying position that, unless given that broad reading here, the statute is unconstitutional as applied. If the opening brief leaves any doubt as to defendant's basic constitutional position, it was amply clarified in his reply brief, where defendant said:

"If this Court should hold that appellant's belief is outside the scope of the Act, then the constitutionality of the Act is in issue. For the reasons cited by the Second Circuit at 326 F.2d 846, appellant respectfully submits that the granting of privileges to the religious which are not granted to the nonreligious upon the same basis is an establishment of religion and violates the guarantees of the First Amendment and the Due Process clause of the Fifth Amendment."

I believe this question is in the case and should be squarely met by the majority before it concludes that the conviction should be affirmed. Indeed, it is futile to affirm without deciding this constitutional issue for, unless decided here, it can be immediately renewed in a proceeding under 28 U.S.C. § 2255 (1964). As indicated below, the only reason I do not grapple with that constitutional issue in this dissent is because I would reverse on other grounds.

As the majority points out in the note attached to their opinion, any application for relief on this ground under 28 U.S.C. § 2255 would be met by several adverse holdings of this court. But experience teaches that constitutional pronouncements by the courts are always open for reconsideration. The Ninth Circuit decisions cited in the note to the majority opinion seem to rest, in the final analysis, on the reasoning that whatever the Government may take away altogether (such as exemption from military service) it may grant on any condition it chooses (such as religious training and belief). I do not believe this reasoning is acceptable in the present constitutional climate.

While deferment on the ground of conscientious objection is a privilege, it cannot be granted or withheld on unconstitutional grounds. *United States v. Seeger*, 2 Cir., 326 F.2d 846, 851, affirmed on other grounds, 380 U.S. 163. See also, *Sherbert v. Verner*, 374 U.S. 398, 404-405, and note 6 and cases there cited; *Baggett v. Bullitt*, 377 U.S. 360, 380; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606. The majority recognizes this when it discusses, on the merits, the first of the two constitutional questions referred to above.

The dimensions of the constitutional problem which the majority opinion does not discuss become clear when note is taken of relevant observations in past decisions of the Supreme Court.

In *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, the Supreme Court said:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." (330 U.S., at 15-16, emphasis supplied)

This language was quoted with approval in *McCullum v. Board of Education*, 333 U.S. 203, 210, in which the Court rejected a strenuous effort to have the quoted language disregarded as dicta, or to have it repudiated. In *Torcaso v. Watkins*, 367 U.S. 488, the Supreme Court again quoted the *Everson* language with approval, and added:

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force

a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements *which aid all religions as against non-believers*, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (367 U.S., at 495, footnotes omitted and emphasis supplied)

The broad interpretation given by the Supreme Court in *Everson* to the Establishment Clause of the First Amendment, was again approved in *McGowan v. Maryland*, 366 U.S. 420, 442. And in *Abington School District v. Schempp*, 374 U.S. 203, 216, the Supreme Court, once more quoting *Everson*, stated that it has, "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."

None of these Supreme Court decisions dealt with the constitutionality of the "religious training and belief" provision of section 6(j) of the Act now in question. But, to say the least, the rationale of these other decisions provides fodder for a strong argument that the "religious training and belief" provision of section 6(j) cannot withstand a constitutional challenge.

It is in this setting that I turn to the first question dealt with by the majority on this branch of the case. But for the majority holding that the Appeal Board denial of I-O and I-A-O classifications has a basis in fact because there is evidence to indicate that Welsh's conscientious objections are not premised on "religious belief," we would not have to reach the constitutional questions. It may be added that it is acceptable appellate practice to give statutory language a broad or narrow reading if, by so doing, the constitutionality of the statute can be saved. In effect, this is what the Supreme Court did in *Seeger*, in construing the term "Supreme Being." As Justice Douglas said in his concurring opinion in that case:

"The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a *tour de force* if we construe the words 'Supreme Being' to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States v. Rumely*, 345 U.S. 41, 47." (380 U.S. at 188, footnote omitted)

In holding that there is a basis in fact for the Appeal Board's determination that Welsh's conscientious objection is not based on religious training and belief, the majority reasons: (1) that, under *Seeger*, the sufficiency of a registrant's conscientious objection is to be measured by the *strength* of the objection plus the *source* of the objection; (2) Welsh's objection has the requisite strength, as the Government concedes; but (3) his objection does not have the requisite source, because it is not premised upon a religious belief.

I agree that, under section 6(j) of the Act, as construed in *Seeger*, the conscientious objection must be of a religious nature. But, having regard for all of the circumstances of this case, I do not believe that there is a basis in fact for a determination that Welsh's objection was not of a religious nature in the statutory sense.

It is now necessary to review, in considerable detail, the statements made by Welsh, in the administrative proceedings, concerning the basis of his conscientious objection.

In his conscientious objector form, signed on April 24, 1964, Welsh struck the words "my religious training and"

from the statement of the source of his conscientious objection. He checked the "no" square opposite the question, "Do you believe in a Supreme Being?" In one item of this form, Welsh was requested to describe the nature of his belief and whether his "belief in a Supreme Being involves duties which to you are superior to those arising from any human relation." The quoted portion of this item was not applicable to Welsh because he had already indicated that he did not believe in a Supreme Being. This probably explains why, in an attached sheet giving his answer to this inquiry, Welsh stated that his belief that one should abstain from violence toward another person:

"is not 'superior to those arising from any human relation.' On the contrary, it is essential to every human relation." (Emphasis in original.)

In this attached sheet Welsh added that he could not conscientiously comply with the Government's insistence that he assume duties which he feels "are immoral and totally repugnant." In answer to another inquiry in this form, Welsh attached another sheet stating, among other things, that he came to his realization that it is wrong to wilfully kill or injure another through a series of conversations with a number of pacifists.

At the time Welsh made these statements, section 6(j) defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. . . ." The "Supreme Being" provision of the religious test was dropped from section 6(j) on June 30, 1967. 81 Stat. 100-104.

The Supreme Court did not decide *Seeger* until March 8, 1965. In that decision, 380 U.S. 163, the Supreme Court made it clear that one could have a religious belief

within the meaning of section 6(j) of the Act without believing in a Supreme Being as that term is usually understood.

The *Seeger* decision had been issued when Welsh next made statements to the administrative agency concerning the basis of his conscientious objection, in a letter dated June 22, 1965. Apparently by that time he had been told that the term "Supreme Being," as used in the statute, may have a broader meaning than he had originally supposed. Nevertheless, as indicated by footnote 3 in that letter, Welsh was still puzzled concerning the extent to which, if any, the "Supreme Being" clause affected the "religious training and belief" test of section 6(j).

In his letter of June 22, 1965, Welsh went on to explain that it is his belief that each of us possesses "some sort of ethical apparatus, a conscience, if you will." Expressing the view that it is impossible to assert the absolute truth or falsity of an ethical law Welsh adds, in a footnote, extensive quotations from Ludwig Wittgenstein, *Logisch-philosophische Abhandlung*, Routledge & Kegan Paul, London, 1963, page 145, translated by D. F. Pears and B. F. McGuinness. Among the quotations thus approved by Welsh is one to the effect that the sense of the world must lie outside the world. According to this writer,

"If there is any value that does have value, it must lie outside the whole sphere of what happens and is the case."

"Ethics is transcendental."

At a later point in this letter, Welsh states that, in our failure to recognize the political, social and economic realities of the world we, as a nation, fail our responsibility as a nation. He also inquires, "To what degree are we

economically and socially committed to 'look for' aggression?" He added, in another footnote, "I am afraid reason has already subverted my commitment to the military ethic."

On July 15, 1965, Welsh was interviewed by Owen J. Brady, a Department of Justice Hearing Officer. During that inquiry, Welsh submitted a copy of his letter of June 22, 1965, as "Exhibit A." In a six-page letter dated August 23, 1965, the Department of Justice gave the Appeal Board a report based on this inquiry. Among other things, this report recites that Welsh attended a Sunday School weekly from age twelve to age sixteen or seventeen, but had not attended a church since then, except on five or six occasions. According to this report, Welsh stated that his mother made him attend Sunday School and he "never got anything out of it."

Based on his questioning of Welsh, the Hearing Officer reported that Welsh has no belief in the existence of God or a Supreme Being, but believes in the "natural law" as a force outside of men, such force not being an entity. According to the Hearing Officer, Welsh described "natural law" as laws affecting the relationship of human beings such as the feeling of gregariousness; and was of the view that ethics are implicit within us governing the conduct of individuals. Welsh, the report states, does not believe in a life after death or in what might be called a human soul.

The report states that Welsh reiterated that he did not believe in taking a human life but he did not see it as a moral or religious wrong but simply as a social "error," or illogical act. The Hearing Officer reported that several times Welsh denied that any of his thinking had a religious basis. Welsh, according to this report, stressed that his opinions have been formed by reading in the fields of history and sociology, and that they are purely "natural" as

opposed to religious. The Hearing Officer found that the registrant, is sincere in his convictions but that his ideas are incomplete and are in the process of formulation. The Hearing Officer found no religious basis for the registrant's conscientious objector claim.

On October 13, 1965, Welsh wrote an eight-page letter to the Appeal Board commenting upon the Department of Justice report summarized above. Among other things, Welsh stated in his letter:

"... I assumed Mr. Bradley was using the word 'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious.' I do believe the taking of life—anyone's life—to be morally wrong. It is not anyone's business to take anyone's life."

In this letter, Welsh also made the following significant comments:

"... I certainly do not mean to imply, that the religious training I received there [in Sunday School] had *nothing* to do with the ethical or moral values I live by." (Emphasis in original.)

"... Mr. Bradley insisted upon describing what I called 'natural law' as a 'force,' whereas I simply meant 'natural law' to be taken as 'the laws of nature.' The laws of nature are 'outside,' or beyond the control of men, but it is to perpetuate a semantic absurdity to characterize either 'natural law' or 'force' as an 'entity,' and in trying to avoid doing so I may have caused Mr. Bradley to misunderstand me."

"... I believe both ethical and religious values usually arise from the same source: the individual's concern for other individuals."

"... This concern [each individual's concern for the rest], it seems to me, is implicit in all religious belief,

even the most primitive, where, though its expression seems sometimes to be bizarre, it still acts to govern people's relationships, one to another."

"This, I suppose, is the crux of my problem of explaining my beliefs in religious terms. Perhaps I erred in taking such pains to point out that I do not believe in the 'standard notion' of God. I think my beliefs could be considered religious, in the sense I have just explained. I do not call myself religious, simply because most people then assume that I believe in God, in the conventional sense." (Emphasis in original.)

These observations by Welsh are in the last statement he filed in the administrative proceeding and are the best evidence of the nature of his conscientious objection. In appraising them we should give heed to this statement in the *Seeger* opinion:

"While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

"Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." (380 U.S. at 184).

It seems to me that, read as a whole, with particular emphasis upon his last statements, Welsh's disclaimer of a religious motivation was predicated upon a misunderstanding of the statutory meaning of the term, as construed in *Seeger*. When he fully realized the broad reading which *Seeger* gave to that term, Welsh made it clear that he did

have a religious motivation. Accepting that premise, the fact that his belief was also predicated in part on political, sociological or philosophical views, is immaterial. Likewise, although Welsh may have predicated his belief to a substantial extent on a personal moral code, that was not the sole basis of his belief. As the Supreme Court said in *Seeger*:

"We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a 'merely personal' moral code." (380 U.S. at 186).

See, also, *Fleming v. United States*, 10 Cir., 344 F.2d 912, where the court said:

"As we read the *Seeger* case, it clearly lays down the rule that before a conscientious objector classification may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code', those factors must be the sole basis of his claim for the classification." (344 F.2d at 915-916).

It is important to remember that the statute does not distinguish between externally and internally derived beliefs. *Seeger*, 380 U.S. at 186. Once it is determined that the basic belief does not derive exclusively from political, sociological or philosophical views, or a purely personal moral code, the source of the belief ceases to be a relevant subject of inquiry. The question then is only whether it

is held with the requisite strength. Under *Seeger*, 380 U.S., at 176 and 184, it is held with the requisite strength if it occupies the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.

As I appraise this record, there is no basis in fact for holding that Welsh's beliefs on which his conscientious objection is premised, do not occupy this place in his life. He is willing to go to jail rather than do violence to his beliefs, which is more than can be said for many who profess a belief in a Supreme Being.

Moreover, I am not sure that the correctness of the Appeal Board's determination as to the adequacy of Welsh's beliefs is to be judged by whether there is any basis in fact for such determination. The Supreme Court did not seem to apply such a measure in applying the principles announced in *Seeger* to the three cases decided under that title. It is probably just a question of whether the Appeal Board applied the right test. In my opinion it did not.

I thus do not reach the critical constitutional question of whether the "religious training and belief" provision of section 6(j) of the Act, as here applied, violates the "Establishment of Religion" Clause of the First Amendment. The result reached by the majority represents a negative answer to that constitutional question, but the majority has not said why.

I would reverse.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Excerpt from Proceedings of Monday,
September 23, 1968

Before: HAMLEY and ELY, Circuit Judges, and POWELL,
District Judge

**Order Directing Filing of Opinion and Dissenting Opinion
and Filing and Recording of the Judgment**

ORDERED that the typewritten opinions this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment to be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Excerpt from Proceedings of Friday,
January 31, 1969

Before: HAMLEY and ELY, Circuit Judges, and POWELL,
District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed October 7, 1968 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

**ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI**

UPON CONSIDERATION of the application of counsel for petitioner(s),

It IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 1, 1969.

/s/ W. O. Douglas

*Associate Justice of the Supreme
Court of the United States*

Dated this 26th day of February, 1969.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

October 13, 1969.

J. B. Tiez, Esq.
257 South Spring Street
410 Douglas Building
Los Angeles, California 90012

RE: WELSH v. UNITED STATES
No. 76, October Term, 1969

Dear Mr. Tiez:

This will inform you that the Court today took the following action in the above-entitled case:

"The petition for a writ of certiorari is granted and the case is placed on the summary calendar. This case is set for oral argument with No. 305 in which further consideration of the question of jurisdiction was this day postponed."

I enclose a memorandum describing the time requirements and procedures under the Rules and a copy of the Rules.

The additional docketing fee of \$50, Rule 52(a) is due and payable.

For your information, counsel are as follows in *United States v. Sisson*, No. 305, October Term, 1969:

For Appellant

Hon. Erwin Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

For Appellee

John G. S. Flym, Esq.
Foley, Hoag & Eliot
148 State St.
Boston, Mass. 02109

Very truly yours,

John F. Davis

Clerk

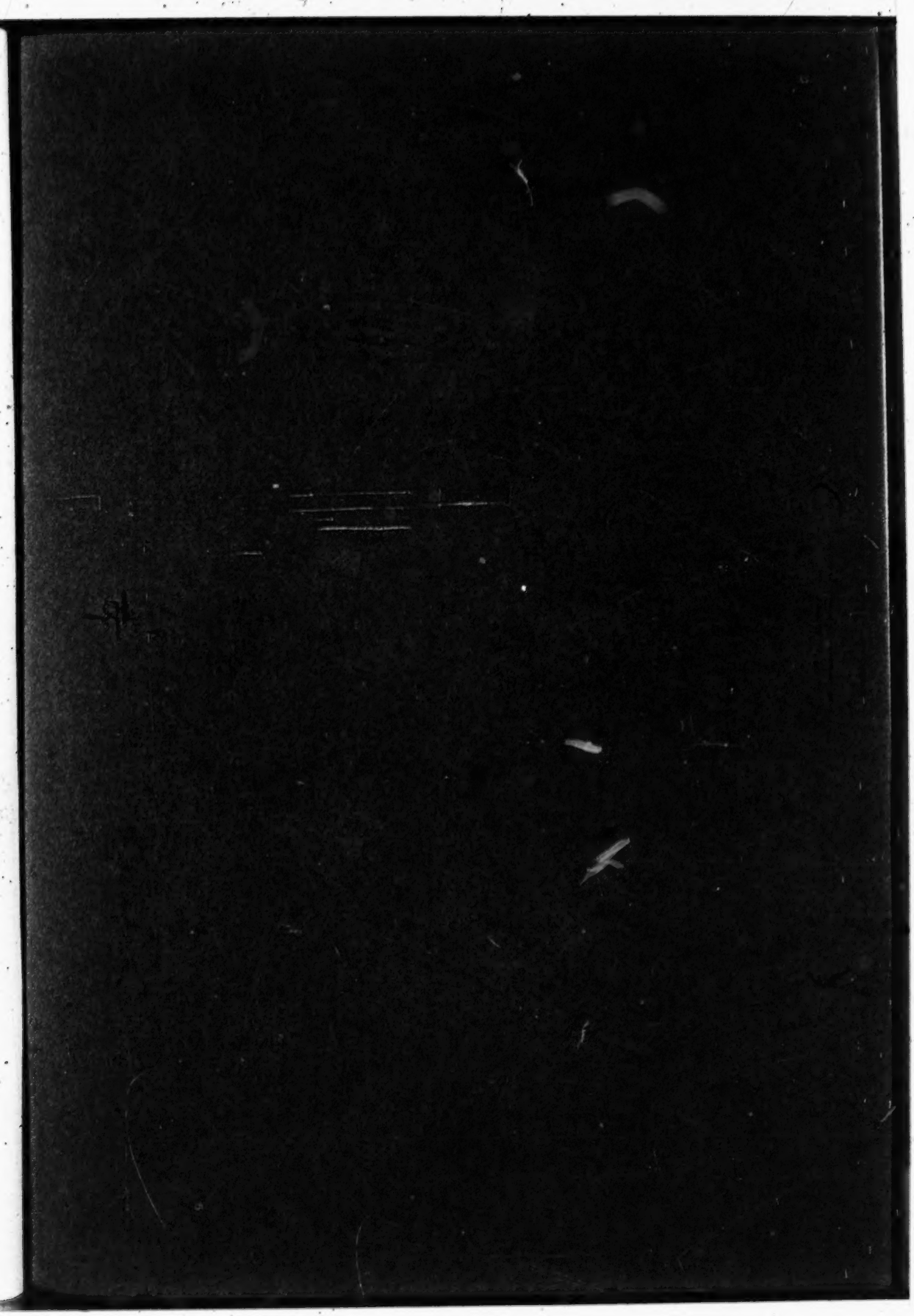
By /s/ Helen K. Loughran

(Mrs.) Helen K. Loughran

Assistant Clerk

AIRMAIL

Enclosures



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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [REDACTED] 1969

No. [REDACTED]

76

ELLIOTT ASHTON WELSH, II.
Petitioner,

VS.

UNITED STATES OF AMERICA.
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

ELLIOTT ASHTON WELSH, II,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

To THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1968. See Appendix B to this petition.¹

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to April 1, 1969.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional question raised by petitioner was discussed by the dissenting judge, in the Court of Appeals opinion. It is that ~~the statute~~, as applied here, is unconstitutional in that it is in contravention of the First Amendment.

The second question raised by petitioner is that a denial of procedural due process exists where, as here, the induction officials do not afford a selectee the mandatory opportunity to fail the loyalty oath, where, as here, there is clear reason to believe he would refuse to take such an oath.

These two questions were briefed to the Court of Appeals, and otherwise properly raised.

1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on January 31, 1969. See Appendix C to this petition.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 2].

Petitioner pleaded "not guilty" and was tried by the Honorable Russell E. Smith, District Judge, sitting alone without a jury. Petitioner was found guilty and sentenced to imprisonment for a period of three years [CT 7].

A written Motion for Judgment of Acquittal was filed during the trial [CT 5 and RT 12, Lines 11-20].²

6. THE FACTS

In December, 1961, petitioner registered with the Selective Service System [E 4].³

On April 10, 1964, petitioner requested and was given a Special Form for Conscientious Objector, SSS Form 150 [E 16]. This form was executed and returned to the local board on April 24, 1964 [E 17]. Petitioner signed that portion of the Form 150 applicable to objectors to combatant training. He altered this statement by striking out the words "my religious training and" so that the statement read:

2. RT refers to the Reporter's Transcript.

3. "E" refers to plaintiff's Exhibit 1, the appellant's Selective Service file.

"(A) I am, by reason of belief, conscientiously opposed to participation in war in any form. I therefore claim exemption from combatant training and service in the Armed Forces. /s/ Elliott A. Welsh, II" [E 17].

He answered the question, "Do you believe in a Supreme Being?" by putting an "X" in the box marked "no". He attached a note explaining the nature of his beliefs [E 21 and 22].

On May 12, 1964, petitioner's local board granted him a classification of I-A-O [E 11, line 7 of Minutes of Action].

On May 25, 1964, petitioner sent the local board a letter amending his Form 150 to request classification in Class I-O, claiming exemption from both combatant and non-combatant training and service [E 26] and requesting a personal appearance.

The local board hearing was held on June 9, 1964. The local board's resume of this personal appearance indicates its summary nature [E 29]. Petitioner later testified that it took 30 to 45 seconds altogether [RT 18]. Petitioner mailed to the local board a letter which they received on June 19, 1964, strongly protesting their refusal to consider his reclassification claims [E 31 to 33].

An appeal was taken to the Appeal Board. The Department of Justice Hearing Officer, Mr. Owen J. Brady, interviewed appellant on July 15, 1965. A copy of this Hearing Officer's full report was introduced into evidence at the trial as "Defendant's Exhibit 3" [RT 21, line 15], and is included with the Transcript of Record upon this appeal. The Hearing Officer concluded that petitioner was sincere in his conscientious objection to war but that he "could find no religious basis for the registrant's beliefs, opinions

and convictions." [DE 7].⁴ He recommended that petitioner's claim be denied both as to combatant and to non-combatant training and service.

The Department of Justice furnished the Appeal Board with a six page letter, containing excerpts from the Hearing Officer's report and stating the recommendation that appellant be denied classification in either Classes I-O or I-A-O [E 39 through 44]. Full copies of the FBI report on petitioner and of the Hearing Officer's full report on petitioner were not furnished to the Appeal Board [RT 27 and 28]. Neither were these reports furnished to petitioner although this had been requested by him [RT 22, line 6], until the trial, when the Hearing Officer's report alone was given to petitioner's counsel [RT 20, lines 22 and 23]. Thus petitioner did not have this data at the time he prepared his rebuttal to the Department of Justice recommendation, as provided by the regulations [E 60 through 67].

Petitioner sent the Appeal Board an eight page letter explaining his belief in relation to the question of the existence of a "Supreme Being." The Appeal Board clerk told petitioner that she would make a "summary" of this material and present it to the Appeal Board [RT 23, lines 15 to 22].

While this appeal was pending, petitioner's wife became pregnant. Petitioner conveyed this information to the clerk of the local board and was told "if we want any more information from you, we will send you a form." [RT 19, lines 11 to 17]. No Current Information Questionnaire was sent to petitioner [RT 20, lines 10 to 12]. The Appeal Board decision reclassifying petitioner I-A arrived two

4. DE refers to Defendant's Exhibit 3, the Hearing Officer's full report.

days later [RT 20, line 5] and the Order to Report for Induction came three days after that [RT 20, line 9]:

Petitioner reported to the Induction Station on December 5, 1965, as ordered [RT 23, line 23 et seq.]. Petitioner's Form DD 98, the Armed Forces Security Questionnaire, had been executed over one year prior to the date of induction [E 87 through E 90], on April 30, 1964. Petitioner told the Induction Station personnel that he could not re-execute the DD Form 98 as it had been made out the year before because some things had changed and his answers would be different [RT 24, lines 19, 20].

Petitioner was not given a new DD 98 to fill out but was taken to an upstairs room and given an opportunity to submit to induction [RT 24, line 12, to RT 25, line 12].

Petitioner refused induction [RT 25, lines 19 to 22].

7. REASONS FOR GRANTING A WRIT

Both questions presented are of an importance greater than the fate of one individual. The questions are national ones because (1) the reach of the Selective Service System is into every hamlet; (2) the "calls" for induction show every indication of continuing; (3) the percentage of registrants professing conscientious objections to war, is not decreasing, and therefore numerically many persons are affected.

The gravity of the constitutional question was pointed out by Circuit Judge Hamley, in his dissent.

The wide impact of the other point, the loyalty oath question, requires a national determination.

8. ARGUMENT

I

The Constitutional Question

Circuit Judge Hamley, in his dissenting opinion (slip op. p. 13) succinctly states this question: "But the majority has failed to discuss another facet of the constitutional question, namely, whether, apart from the 'Supreme Being' clause, in predicating its decision on the 'religious training and belief' clause of section 6(j), the Appeal Board violated the Establishment of Religious Clause of the First Amendment.

"In my opinion this latter question is clearly presented on this appeal because it is inherent in any attack upon the statute predicated upon the Establishment of Religion Clause of the First Amendment. Thus it is immaterial that, in his opening brief, Welsh did not discuss this precise issue other than to point out that the sincerity of his conscientious objection was not only established by the undisputed evidence, but was conceded by the Hearing Officer."

The Court's attention to the full dissenting opinion is respectfully invited.

II

The Loyalty Oath Question

The petitioner was denied due process of law when the armed forces examining and entrance station ordered him to submit to induction without first giving him an opportunity to accomplish the security questionnaire, DD Form 98 as the regulations provide.

32 Code of Federal Regulations, Section 1632.16 provides:

"1632.16 INDUCTION:—At the induction station the selected men who have been forwarded for induction and found qualified will be inducted into the Armed Forces." (Emphasis supplied)

Since there are no Selective Service System regulations on induction proceedings the Army regulations govern. *Chernekoff v. United States*, 9 Cir., 1955, 219 F.2d 721, 724, n. 12.

The pertinent Army regulation is:

AR 601-270 "Personnel Procurement, Armed Forces Examining and Entrance Stations", provides in its pertinent part:

"80. DD Form 98 (Armed Forces Security Questionnaire). A. Preparation: At the completion of the pre-induction examinations all registrants, except registrants in Class I-O (conscientious objectors), who are found to be militarily qualified for service in the Armed Forces, including administrative acceptees, will be given the opportunity to accomplish the Armed Forces Security Questionnaire. DD Form 98 will not be accomplished by registrants otherwise disqualified for induction, and processing under AR 604-10 will not be undertaken for registrants who are otherwise disqualified for induction.

- (1) A commissioned officer who is thoroughly conversant with the regulations and policies pertaining to the accomplishment of the Armed Forces Security Questionnaire (DD Form 98) will be designated to have direct control over the procedures and will present the orientation established for completing the form.
- (2) Volunteers for immediate induction and previously qualified registrants being processed for induction, who have not accomplished the security

questionnaire, or whose security questionnaire is invalid, will be given the opportunity to accomplish the security questionnaire prior to induction.

- (3) At the time registrants are given the opportunity to accomplish the security questionnaire, an orientation will be presented in a manner so as to insure all persons understand the importance of accomplishing the questionnaire. The orientation will consist of the informational material outlined in Appendix IV.
- (4) Individuals who are about to accomplish DD Form 98 will be fully instructed as to the importance of the entries to be made in section IV and of affixing their signatures, and the reasons their cooperation in the accomplishment of the Armed Forces Security Questionnaire is an important step at the beginning of their military service.
- (5) Each individual will be instructed and prepared to respond in accordance with his rights and understanding of the entries he is required to make. Coercion or persuasion will not be used.
- (6) Following the orientation, each individual will be directed to carefully read the entire contents of the DD Form 98 and to answer all questions in section IV by writing 'Yes' or 'No' in the appropriate columns. All entries on the DD Form 98 will be in the individual's own handwriting except where use of typed entries is specified.
- (7) Immediately following the completion of the DD Form 98, and affixing the signature by the declarant, a commissioned officer serving as the witnessing officer will affix his own signature. The practice of permitting DD Forms 98 to accumulate for later signature will be avoided. The witnessing officer may be any duly commissioned officer. It is not mandatory, however, it is preferable that he be an officer who is on duty with the induction station. Registrants will not be required to sign

blank DD Forms 98 to be filled in at a later date by station personnel. This practice negates the value of DD Form 98 should the veracity of the statements therein be challenged. It also renders ineffective the penalty clause for falsification of the form.

- (8) Security questionnaires are valid for a period of 120 days. If the time element between preinduction and induction is in excess of 120 days, the following statement will be placed in the Remarks Section of DD Form 98:

I have this date, _____ reviewed the contents of DD Form 98 prepared by myself on _____ and certify that the statements then made by me are at this time full, true, and correct.

Signature of
witnessing officer

Signature

The use of a rubber stamp and red ink is recommended for this requirement. An orientation in accordance with (3) above will be required for these individuals. An examinee who qualifies or refuses to accomplish this statement will be processed as for initial examinees of these categories.

b. Disposition.

- (1) Security questionnaires which are satisfactorily accomplished by registrants will be forwarded to the appropriate Selective Service local board other records which pertain to the individual, or, when applicable, to the military installation of initial reception.

- (2) A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (see AR 604-10) or who discloses significant derogatory information with respect to his background, or invokes constitutional privileges, and registrants admitting current membership in the Communist party ('known Communists') and registrants for whom credible derogatory information has been received from a reliable source indicating Communist party membership ('alleged Communists') as defined in AR 604-10, will not be inducted into the Armed Forces pending completion of a thorough investigation (Bold type supplied).
- (3) Investigative action as prescribed in AR 604-10 will be initiated at the induction station in all cases of registrants referred to in (2) above.
- (4) If a registrant refuses to complete part of a DD Form 98 he will be requested to enter an explanation of the refusal in the remarks section and to sign the form. A commissioned officer serving as the witnessing officer will affix his own signature. If a registrant refuses to complete any part of a DD Form 98 and refuses to enter an explanation of the refusal in the remarks section and sign the form, the following statement will be entered in the remarks section of the form:

(Registrant's name), a registrant, under the Universal Military Training and Service Act, was this date given an opportunity to execute DD Form 98 and in my presence he refused to do so.

This statement will be signed by a commissioned officer, and forwarded to the appropriate investigative agency in accordance with (3) above.

- (5) DD Form 62 prepared for registrants referred to in (2) above will contain in remarks section the notation 'Acceptability for induction held in abey-

ance, not presently acceptable for induction.' No other notations will be made on the DD Form 62 and no other information or papers will be released to Selective Service local boards. Entries in regard to acceptability for induction will not be made.

- (6) Item 22 on DD Form 47 pertaining to registrants referred to in (2) above will not be completed until the result of investigative action is received from higher headquarters.
- (7) Entry on SSS Form 225 (Physical Examination List) for registrants for whom investigative action has been initiated in accordance with (3) above will indicate induction being held in abeyance. Same notation as required in (5) above will be entered.
- (8) At the time final determination of the case under investigation has been made, the induction station concerned will be advised as to the appropriate action to be taken regarding the registrant whose induction is being held in abeyance. Upon receipt of information from higher headquarters indicating that registrants whose induction is being held in abeyance have been cleared for induction, the induction station will prepare a new DD Form 62 in its entirety and forward it to the appropriate Selective Service local board. Upon receipt of information from higher headquarters indicating that registrants whose acceptability is being held in abeyance have been determined to be unacceptable for induction, the induction station will prepare a new DD Form 62 and forward it to the appropriate Selective Service local board. Original and copy of DD Form 62 prepared in accordance with (5) above, when retained, will be destroyed when the forms are accomplished."

The induction officials did not give this appellant the opportunity to qualify nor did they take any of the appropriate steps prescribed by the Army Regulation. Instead, they ordered him to submit to induction in violation of their own regulations in that they had not taken the required steps to determine if he was qualified for induction.

Note that the regulation is stated in mandatory language. See especially section B (2) set forth above. That section states that registrants in the position appellant was in on March 22, 1966, "will not be inducted".

A defendant in a draft refusal case ordinarily is required to show that he has exhausted all of his administrative remedies or he may not mount an attack on his classification as a defense in court. It is said he is required to exhaust his administrative remedies so that the courts will not be burdened with trials that might have been avoided by the defendant's success at some stage of the administrative process which would preclude his being ordered to submit to induction. The courts have often been rather rigid on this exhaustion point, requiring that the defendant go to the brink of induction, that he complete every step of the process prior to refusing to actually enter the military.

All of the arguments that support the requirement that the defendant exhaust the administrative process apply with equal vigor to the government. Shortcuts to induction taken by the government burden the courts with cases that could have been avoided altogether, to say nothing about the inconvenience and expense to the young men involved.

For this reason, as well as for the reason that deprivation of a chance to avoid the dilemma is grossly unfair to the appellant, the government should be required to exhaust

the administrative opportunities for rejection that the regulations provide before forcing the registrant to induction, refusal and trial.

Finally, we point out that the "fair and equal treatment" provisions of the law have been violated by the refusal to give Welsh the loyalty oath opportunity. Especially is this so in light of his explicit concern over signing it at the time of the induction proceeding. These "fair and equal treatment" provisions of the law are set forth in the regulations, as well as in the Act:

"In classifying a registrant there shall be no discrimination for or against him because of his . . . creed . . . or because of his membership or activity in any . . . religious . . . organization. Each such registrant shall receive equal justice."

32 C.F.R. § 1622.1 (d).

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully

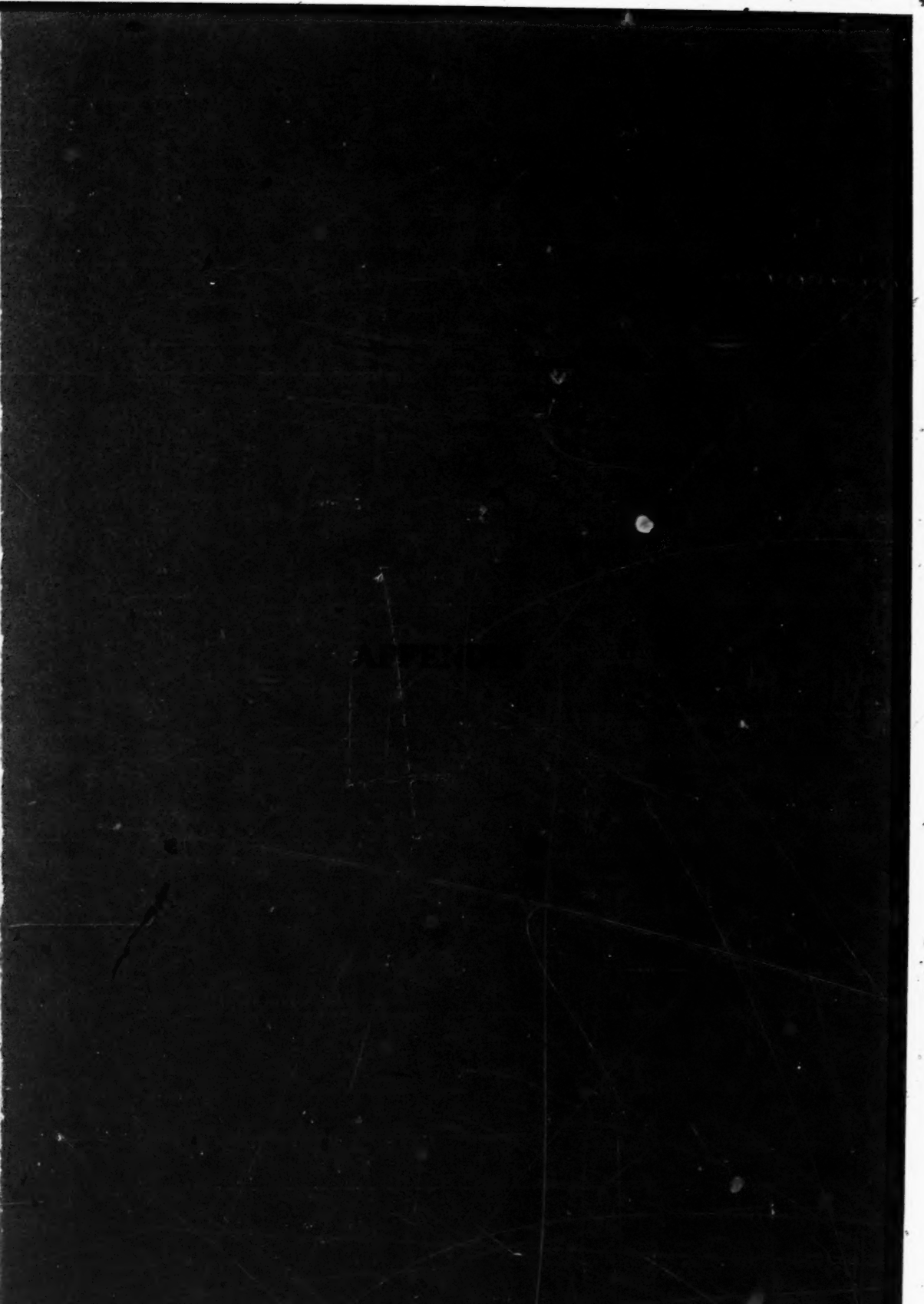
J. B. TIETZ

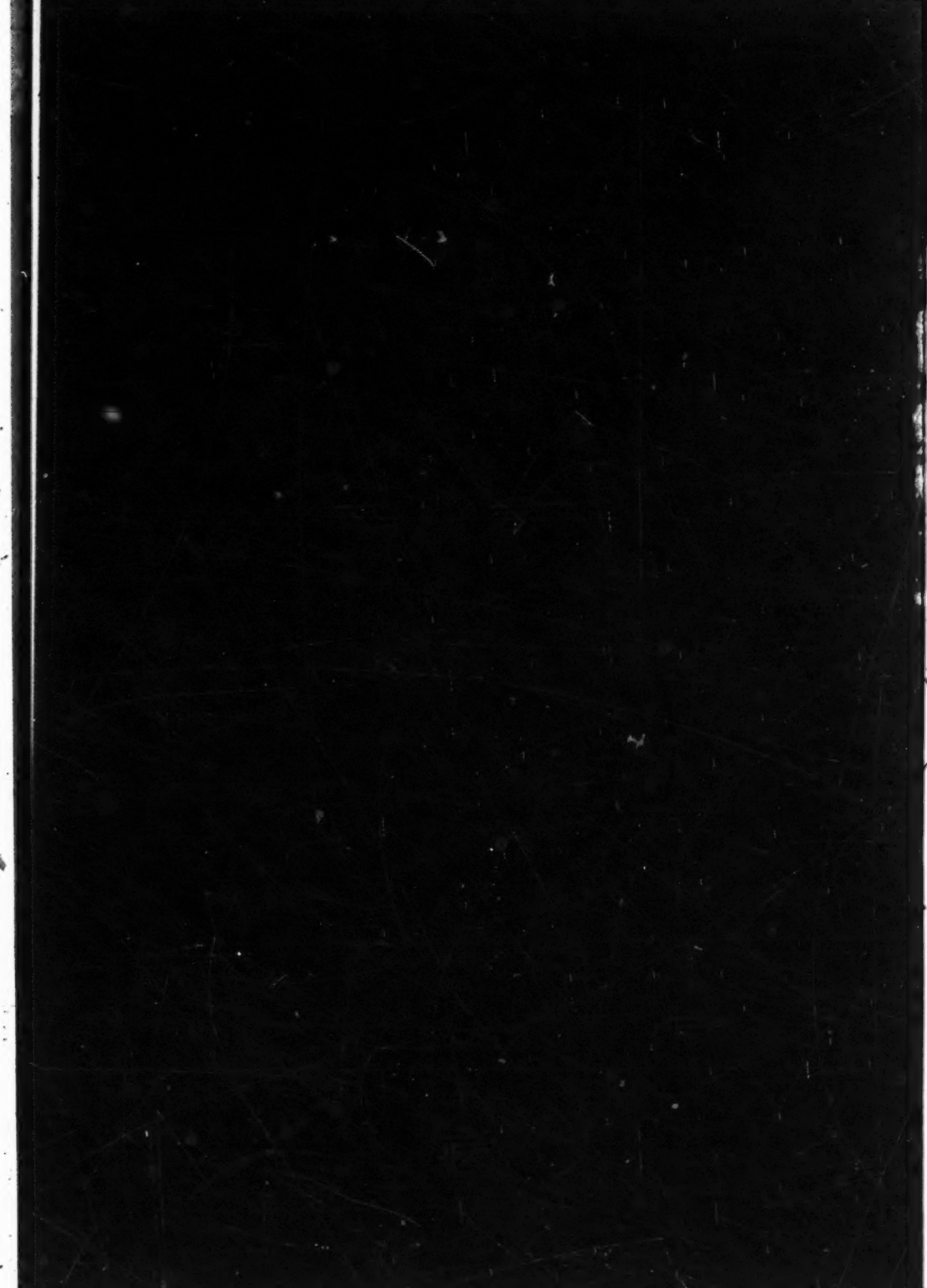
410 Douglas Building

Los Angeles, California 90012

Attorney for Petitioner

March 31, 1969





A1

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ELLIOTT ASHTON WELSH, II,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21,442

[September 23, 1968]

Appeal from the United States District Court
for the Central District of California

Before: HAMLEY and ELY, Circuit Judges, and POWELL,
District Judge

POWELL, District Judge:

This appeal is from a conviction of the appellant for refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462. This Court has jurisdiction under Rule 37 of Federal Rules of Criminal Procedure and 28 U.S.C. §1291.

The appellant Welsh registered with his local board on February 2, 1960. On December 11, 1961 the board received his completed classification questionnaire (SSS Form 100). He did not then claim to be a conscientious objector.

On December 14, 1961 the board classified the appellant I-A. On January 15, 1963 the board received appellant's application for a permit to leave the United States. The application stated that the appellant's classification was I-A. On February 5, 1963 the board issued a permit

allowing the appellant to depart for a period of one year, which expired March 16, 1964. On March 27, 1964 the appellant was ordered to report for a physical examination. On April 10, 1964 appellant requested and was given a special form for conscientious objector (SSS Form 150). It was completed and received by the board on April 24, 1964. In that form the appellant stated that he was "by reason of * * * belief, conscientiously opposed to participation in war in any form."¹ The appellant had altered the statement in the form by striking out the words "my religious training and" so that the statement read as above. He answered the question, "Do you believe in a Supreme Being?" by putting an X in the box marked "No".² He attached a note explaining the nature of his beliefs.

On May 12, 1964 the appellant's local board classified him I-A-O, and on May 25, 1964 the appellant sent the local board a letter amending his SSS Form 150 to request classification as I-O. He claimed exemption from both combatant and non-combatant training and service and requested a personal appearance.

He appeared before the local board on June 9. On June 10 the board informed appellant that he was still classified I-A-O. On June 19, 1964 the board received a letter in which appellant stated he was appealing to the Appeal Board from the refusal to classify him as I-O.

On July 28, 1964 the Appeal Board tentatively determined the appellant should not be classified I-O or any lower class.

On November 15, 1965 the appellant's file was returned by the Appeal Board which classified appellant I-A

1. Plaintiff's Exhibit 1, at 17.

2. *Id.*

by a vote of 3-0. On November 22, 1965 the board mailed the appellant an order to report for induction on December 8, 1965. He reported to the induction center and refused to step forward when his name was called, thereby manifesting his refusal to submit to induction. This prosecution followed.

The appellant raises principal questions as follows:

1. Was the Selective Service System's denial of a conscientious objector classification to appellant without basis in fact and arbitrary, capricious and contrary to law?

2. Were the report and recommendation of the hearing officer and the Department of Justice to the Appeal Board arbitrary, capricious and illegal because based upon unlawful standards?

3. Was the appellant denied a fair hearing before the local board because the board gave appellant too short a hearing or failed to pass upon his eligibility for I-O classification?

4. Was the appellant denied a fair hearing before the Appeal Board in that neither he nor the Appeal Board was given the full report of the FBI or of the hearing officer made to the Department of Justice?

5. Was the appellant denied due process by the induction station's failure to give him an opportunity to complete DD Form 98, Armed Forces Security Questionnaire, as required by the regulations?

6. Did the local board thwart appellant's timely presentation of his request for classification as III-A based on his wife's pregnancy and thus deny him due process of law?

Appellant claims that the Appeal Board denial of I-O and I-A-O classifications was without any basis in fact. He also contends that insofar as the Appeal Board decision rested upon the "Supreme Being" clause of section 6 (j)³ it is premised upon an unconstitutional distinction between theistic and nontheistic religious beliefs.

In *Seeger v. United States*, 380 U.S. 163, 176 (1965) the Supreme Court explicitly adopted the following test for evaluating conscientious objector claims:

"A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."

A determinative question posed by application of the *Seeger* test to the facts of this case is whether the sufficiency of a registrant's beliefs is to be measured by strength or source or both. Unquestionably strength of belief (or sincerity) is an accepted criterion for judging conscientious objector claims. See *Seeger v. United States*, *supra*, at 185; *Dickinson v. United States*, 346 U.S. 389, 396 (1953). The court in *Seeger* also noted, apparently with approval, that:

"* * * The section excludes those persons who disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. * * *". *Seeger v. United States*, *supra*, at 173.

This quotation obviously contemplates a test based on the source of a registrant's beliefs. The belief is the same for

3. Universal Military Training and Service Act, § 6(j), 50 U.S.C. App. § 456(j). The "Supreme Being" clause was omitted from the recent reenactment of the draft law. Military Selective Service Act of 1967, § 7, 81 Stat. 101.

both philosophical and religious objectors, that it is wrong to participate in war.

The government concedes that appellant's beliefs are held with the strength of more traditional religious convictions. But appellant constantly declared that his beliefs stemmed from sociological, economic, historical and philosophical considerations. He denied that his objection to war was premised on religious belief. The Appeal Board was entitled to take him at his word, as he failed to meet the statutory standard, and to deny his request to be so classified.

Appellant next urges us to adopt the well reasoned opinion of Judge Kaufman in *Seeger v. United States*, 326 F.2d 846 (2d Cir. 1964), *rev'd*, 380 U.S. 163 (1964). That Circuit Court opinion held that the "Supreme Being" clause of section 6(j) unconstitutionally discriminated between theistic and nontheistic religious beliefs, 326 F.2d at 852-855. But in our case the Department of Justice recommendation quoted the test given above from *Seeger*, 380 U.S. 173. The facts and result of *Seeger* at the Supreme Court level lead to only one conclusion: the Supreme Court deleted the "Supreme Being" clause from the statute, as Mr. Justice Douglas observed "in the candid service of avoiding a serious constitutional doubt." Concurring opinion of Douglas, J., *United States v. Seeger*, 380 U.S. at 188 (1965), quoting from *United States v. Rumely*, 345 U.S. 41, 47 (1953). We see no need to consider the constitutionality of this clause because it was already *sub silentio* stricken from the statute and was so considered by the Department of Justice in this case.

The hearing officer found "no religious basis for the registrant's conscientious objector claim."⁴ His conclusion

4. Plaintiff's Exhibit 1, at 42.

was accepted by the Department of Justice which recommended that the Appeal Board deny appellant's claim for I-O classification. Appellant contends that this recommendation was bottomed on artificial and unlawful standards. In support of this contention appellant relies upon the following observations of the hearing officer: Appellant had not formulated an opinion on euthanasia; he had not formulated an opinion on birth control and, more precisely, upon the question of when life begins in the womb; appellant did not believe in life after death; he did not believe in God or any other entity with authority over man.

A Department of Justice recommendation premised upon an error of law vitiates an Appeal Board classification. *Sicurella v. United States*, 348 U.S. 385, 392 (1955). In *Shepherd v. United States*, 217 F.2d 942, 946 (9th Cir. 1954), the hearing officer concluded that Shepherd's willingness to participate in theocratic warfare negated his claim of conscientious objection. This court held this conclusion was wrong as a matter of law and reversed Shepherd's conviction. In *Bradley v. United States*, 218 F.2d 657, 663 (9th Cir. 1954), *rev'd on other grounds*, 348 U.S. 967 (1955), the hearing officer observed that Bradley believed in using force in self-defense. But the hearing officer did not conclude that this fact negated Bradley's claim. The court distinguished between a legally insufficient adverse conclusion and mere observation of facts which, had they led to an adverse conclusion, would have been legally insufficient to support it. *Bradley v. United States*, *supra*, at 663, n. 9. The observations upon which appellant relies were only observations of fact. We assume, *arguendo*, that none of them necessarily negates appellant's claim for conscientious objector classification. See *Seeger v. United States*, 380 U.S. 163 (1965). But the hearing officer did not conclude that these observations negated appellant's claim.

The distinction drawn in *Bradley v. United States*, *supra*, between observations of fact and conclusion of law, controls.

Appellant also suggests that these observations were improper. But appellant altered the Special Form for Conscientious Objectors, denying a religious basis for his beliefs and denying belief in a Supreme Being. These alterations raised uncertainty about the "religious" quality of his beliefs. The purpose of the hearing officer's inquiry is to explore uncertainties. *MacMurray v. United States*, 330 F.2d 928, 932 (9th Cir. 1964). How can the hearing officer proceed without inquiring into the application of a registrant's beliefs to ethical, religious, moral and philosophical problems? And what function would the inquiry serve if a registrant's answers could not be transmitted through the Department of Justice to the Appeal Board?

Appellant contends that he was denied a fair hearing before the local board. Specifically, he contends that his personal appearance was too short and that the local board failed to pass upon his eligibility for I-O classification.

When appellant appeared before the local board he declared that he felt his classification should be I-O rather than I-A-O. The reasons for this request, he said, were detailed in his letter of May 25, 1964 (which also contained his request for personal appearance and notice of appeal). He made no attempt to present additional material to the board. Selective Service Regulation 1624.2(B), 32 C.F.R. § 1624.2(b), affords a registrant the opportunity to present "further information." But no regulation requires a board to question a registrant when he says his position has already been stated. Appellant's hearing was short because he had nothing further to say.⁵

5. "I appeared before the board to answer questions about my appeal and to explain my position in the light of those answers.

No unfairness appears in this respect. See *Martin v. United States*, 190 F.2d 775, 778-779 (4th Cir.), cert. den., 342 U.S. 872 (1951).

Appellant's contention that the local board failed to pass upon his I-O claim is based upon a letter he wrote after his personal appearance. In that letter he states: "Then one of the board members said 'we don't have authority to pass upon his classification. It will have to go to the Appeal Board.'"⁶ If this statement was made as quoted the board member was mistaken. Selective Service Regulations contemplate a decision by the local board following personal appearance of a registrant. 32 C.F.R. § 1624.2(c). Failure to render a decision vitiates a later classification by the Appeal Board. *Knox v. United States*, 200 F.2d 398 (9th Cir. 1952).⁷ But it does not appear that this statement was made as quoted. In his letter appellant continues: "This quotation is as close as I can recall. A secretary was transcribing the conversation so the statement should be a matter of record."⁸ The "record" to which appellant refers states: "Registrant was informed that since he has appealed the I-A-O classification, his file would go to the Appeal Board and they would investigate to determine whether or not he qualifies for a I-O classification."⁸ There is no reference to local board jurisdiction, nor any explicit statement that the board would not render a decision. The record is consistent with the probability that the board was informing appellant that his claim was being denied. In fact this appears to be what happened, for the next day appellant received a new notice

I asked whether any members of the board had any questions about my appeal. They had none." Appellant's letter of June 18, 1964, Plaintiff's Exhibit 1, at 31-32.

6. *Id.* at 32.

7. Plaintiff's Exhibit 1, at 32.

8. Plaintiff's Exhibit 1, at 29.

of classification from the local board informing him that he was being retained in class I-A-O.⁹ This case is distinguishable from *Knox v. United States, supra*; the presumption of regularity which was overcome in that case governs here.

Appellant contends he was denied a fair hearing before the Appeal Board because neither the Appeal Board nor appellant was provided with the full report of the FBI investigation or the full report of the hearing officer.

We think appellant's contention directed to the Department of Justice's refusal to provide him with a full copy of the FBI investigative report is without merit. In *United States v. Nugent*, 346 U.S. 1, 5 (1953), the Court held:

"* * * We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitled them to no guarantee that the FBI reports must be produced for their inspection. * * *

Appellant attempts to distinguish *Nugent* because the registrant in that case did not request a copy of the report. This factor was noted by the Court. *United States v. Nugent, supra*, at 7, n. 10. But as the quotation above indicates the Supreme Court did not so restrict its decision. Nor can we see any reason why it should be so restricted.

To refute appellant's contention that the entire FBI record should have been forwarded to the Appeal Board it is only necessary to advert to the identical circumstance in *United States v. Nugent, supra*, at 7, n. 10.

The same rationale applies to appellant's complaint about the Department of Justice's failure to provide either

9. The notice of classification is not mailed until a decision to reclassify or to deny reopening is reached by the board. 32 C.F.R. § 1624.2(d).

appellant or the Appeal Board with the hearing officer's full report. The analogy is strengthened by appellant's presence at the hearing and his consequent knowledge of what transpired there. This knowledge largely obviates the objections to the majority opinion in *Nugent* expressed by Mr. Justice Douglas in dissent. Contentions identical to those made by appellant were considered in *DeRemer v. United States*, 340 F.2d 712, 715-717 (8th Cir. 1965). Drawing upon the body of administrative law, and especially considering the unavailability of intra-agency memoranda, the court rejected these contentions. So do we.

Appellant contends his reply to the Department of Justice recommendation, supplied by him in accordance with 32 C.F.R. § 1626.25(e), was never placed before the Appeal Board and that this procedural irregularity vitiated the classification process. He testified:

"I took the rebuttal to the Appeal Board. * * * [F]inally a clerk came out of her room, and she asked me what I wanted, and I said that I had the letter for the—letter of rebuttal to the Attorney General's letter for the Appeal Board. She said, 'Oh, yes, * * *'. And she said, 'Well, I'll see that the Board gets a summary of this letter.' And I said, 'You mean they don't see the letter.' And she said, 'Well, they could if they wanted but they usually don't have a great deal of time and they usually read the summary.'" Record, Vol. 2, at 23.

"It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown." *Lewis v. United States*, 279 U.S. 63, 73 (1929) (alternative holding). *Keene*

v. *United States*¹⁰ explained the foundation of this presumption:

"The presumption which attends these proceedings [local board level] is founded in the policy of the law, and is derived from the faith and credit we owe to official acts of duly constituted authority. As such, it is legally sufficient to sustain the burden of regularity and validity until dissipated by some probative evidence to the contrary."

See also, 9 Wigmore, *Evidence* §§ 2490, 2491 (3rd Ed. 1940); ALI *Model Code of Evidence*, Rule 704, Introductory Note to Chap. VIII (presumptions), Morgan, Forward at 52-65 (1942). There is no showing that the Appeal Board did not receive or consider appellant's letter. This is merely an inference which might, but need not, be drawn. As such, it is insufficient to overcome the presumption of regularity. *Keene v. United States*, *supra*, note 10.

II

Before being given an opportunity to submit to induction appellant was asked to re-execute his Armed Forces Security Questionnaire, DD Form 98. He stated that some of the answers he gave the year before would no longer be correct and refused to re-execute the form. AR 601-270, ch. 4, § II, para. 80(b)(2) at 4-7 (1965) declares that a registrant who refuses to execute DD Form 98 will "not be inducted into the Armed Forces pending

10. 266 F.2d 278, 280 (10th Cir. 1959). Keene contended that the board which classified him acted without a quorum. A board or panel thereof consists of three or more members. 50 U.S.C. App. § 460(b)(3). A majority of the members of the board or panel constitutes a quorum. 32 C.F.R. § 1604.52a(d). The vote which classified Keene was 2-0. Another vote, four years later, was 4-0. If the number of board members had not changed (and there was no evidence on this point either way) the initial vote was taken without a quorum. The court recognized that lack of a quorum might be inferred, but held this evidence insufficient to overcome the presumption of regularity.

completion of a thorough investigation." The investigative process is detailed in AR 604-10, § III, para. 18 (1959); 604-10, §§ IV, V (1959). Rather than delay appellant's induction pending investigation, induction station personnel ordered him to step forward. Appellant now contends that this procedural irregularity vitiates the command to step forward and, therefore, his conviction. We cannot agree.

The rule is well established that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knorr v. United States*, 200 F.2d 398, 401 (9th Cir. 1952). See *Edwards v. United States*, _____ F.2d _____ (9th Cir., May 10, 1968). Appellant did not offer to prove that an investigation by military intelligence would have uncovered evidence that he was a security-risk.

None of the factors which have led us to presume prejudice from procedural omissions are present in this case. Comparison of appellant's contentions with our decision in *Briggs v. United States*, _____ F.2d _____ (9th Cir. June 26, 1968) will illustrate the absence of these factors. In *Briggs*, induction station personnel denied the registrant a physical inspection required by AR 601-270, ch. 3, III, para. 69 (1965). We presumed prejudice and reversed. A registrant's failure to take physical examinations precludes him from challenging his classification; he is said to have failed to exhaust his administrative remedies. See the discussion of *Falbo v. United States*, 320 U.S. 549 (1944) in *Estep v. United States*, 327 U.S. 114, 123 (1946). The Army's refusal to give a physical inspection should bear equivalent consequences.

Execution of DD Form 98 has not been held to be an administrative remedy which the registrant must exhaust.

Also, a medical deferment is granted at least partially for the benefit of the individual registrant. But rejection by the Army for security reasons, like rejection for felony conviction, is wholly for the benefit of the Army and may be waived. See *Nickerson v. United States*, 391 F.2d 760, 762-63 (10th Cir. 1968); *Bjorson v. United States*, 272 F.2d 244, 249 (9th Cir. 1959), *cert. den.*, 362 U.S. 949 (1960), *overruled in part and on other grounds in Daniels v. United States*, 372 F.2d 407, 414 (9th Cir. 1967); *Korte v. United States*, 260 F.2d 633, 637 (9th Cir. 1958), *cert. den.*, 358 U.S. 928 (1959).

The overriding objective of selective service is "to raise an army speedily and efficiently." *Falbo v. United States*, *supra* at 553. But appellant would have us presume prejudice from the Army's refusal to conduct a useless investigation of his political and social background. Without a real showing of prejudice there is no reason to require such a waste of military intelligence resources. Nor should any obstinate inductee be given an opportunity to delay his induction for possibly months by refusing to execute the security questionnaire.

III

Appellant claims that he should have been granted a III-A (dependency) deferment. He argues that proper presentation of his request for this deferment was thwarted by the local board clerk. Appellant testified that he visited his local board to inform it that he had moved and that his wife was pregnant and that he and his wife had made an appointment with a doctor to confirm the pregnancy. He further testified:

"When I asked if I could give the board more information than I had given them, I had filled out an ad-

dress, change of address form, the clerk said to me, 'What is your classification?' I said 'my classification is I-A-O.' The clerk then said 'If we want any more, if we want any more information from you, we'll send you a form.'

Q. Did that form ever come?

A. No sir." Record, Vol. 2 at 19.

This evidence does not support appellant's contention that assertion of a III-A claim was thwarted by the clerk. Nowhere does it appear that appellant told the clerk his wife was pregnant. It is probable that the clerk thought appellant was referring to further evidence in support of his I-A-O classification (conscientious objector available for non-combatant duty). Because appellant had already received this classification, to the best of the clerk's knowledge additional supporting information was unnecessary. As appellant relates it, although he was thinking of his wife's pregnancy, he spoke to the clerk only generally of "more information." It was appellant's duty to request the III-A deferment in writing accompanied by a doctor's certificate. 32 C.F.R. §§ 1625.2 (writing), 1622.30(c)(3) (certificate of pregnancy). The requirement of a writing is mandatory and must be followed if the deferment is to be granted. *Shaw v. United States*, 264 F.2d 118, 119-120 (9th Cir. 1959).

Appellant submitted with his brief evidence of his present III-A status.¹¹ While this provides appellant with a present deferment, it has no bearing on the validity of his I-A classification at the time he refused to submit to induction. *Cox v. United States*, 332 U.S. 442, 454

11. Appendix B to Appellant's Opening Brief.

(1947); *Gatchell v. United States*, 378 F.2d 287, 292 (9th Cir. 1967).

Affirmed.*

HAMLEY, Circuit Judge (dissenting):

As stated in the majority opinion, the Hearing Officer found "no religious basis for the registrant's conscientious objector claim." His conclusion was accepted by the Department of Justice as the basis for its recommendation to the Appeal Board that Welsh's claim for a I-O or I-A-O classification be denied. The Appeal Board implicitly followed that recommendation in denying either of these classifications. The majority holds that, under the circumstances of this case, there was no judicially cognizable administrative error in this regard which undermines the conviction. I respectfully disagree.

In reaching its conclusion, the majority addresses itself to two questions: (1) was the Appeal Board's denial of I-O or I-A-O classifications without any basis in fact? and (2) does the Appeal Board decision rest upon an unconstitutional distinction between theistic and non-theistic

*Note: The dissenting opinion of Judge Hamley, while based on other grounds, mentions the possible unconstitutionality of the "religious training and belief" provision of section 6(j) of the Act. The majority feels that since it was not listed as one of the questions presented in appellant's opening brief or argued there it does not require comment in the majority opinion. The only error claimed is the denial of the motion for judgment of acquittal and this question was not presented in that motion.

The majority feels that any application for relief under 28 U.S.C. § 2255 on this ground would find no support in this record and would be met by the prior holdings of this court sustaining the religious exemption against Establishment Clause attack. *Etcheverry v. United States*, 320 F.2d 873, 874 (9th Cir.), cert. den., 375 U.S. 930 (1963), reh'r den., 375 U.S. 989, 376 U.S. 939 (1964), 380 U.S. 926 (1965); *Clark v. United States*, 236 F.2d 13, 23-24 (9th Cir.), cert. den., 352 U.S. 882, reh'r den., 352 U.S. 937 (1956) *George v. United States*, 196 F.2d 445, 450-452 (9th Cir.), cert. den., 344 U.S. 843 (1952).

religious beliefs? The majority gives a negative answer to both of these questions.

Concerning the second question, I agree with the majority holding, and for the reasons stated in the majority opinion. The Appeal Board decision is not premised upon the "Supreme Being" provision of section 6(j). The Department of Justice report, on the basis of which the Appeal Board acted, noted that, under *Seeger v. United States*, 380 U.S. 163, the term "Supreme Being" was given such a broad reading that, in effect, it added nothing to the "religious training and belief" clause.

But the majority has failed to discuss another facet of the constitutional question, namely whether, apart from the "Supreme Being" clause, in predicating its decision on the "religious training and belief" clause of section 6(j), the Appeal Board violated the Establishment of Religious Clause of the First Amendment.

In my opinion this latter question is clearly presented on this appeal because it is inherent in any attack upon the statute predicated upon the Establishment of Religion Clause of the First Amendment. Thus it is immaterial that, in his opening brief, Welsh did not discuss this precise issue other than to point out that the sincerity of his conscientious objection was not only established by the undisputed evidence, but was conceded by the Hearing Officer.

Defendant naturally concentrated his attention in that brief on the broad reading which *Seeger* gave the Supreme Being and religious training and belief clauses of the statute. If he prevailed on that argument he did not need a ruling that the statute was unconstitutional as applied; just as the Supreme Court, in *Seeger*, avoided the constitutional issue by giving the statute a broad reading. But

there was implicit in defendant's presentation his underlying position that, unless given that broad reading here, the statute is unconstitutional as applied. If the opening brief leaves any doubt as to defendant's basic constitutional position, it was amply clarified in his reply brief, where defendant said:

"If this Court should hold that appellant's belief is outside the scope of the Act, then the constitutionality of the Act is in issue. For the reasons cited by the Second Circuit at 326 F.2d 846, appellant respectfully submits that the granting of privileges to the religious which are not granted to the nonreligious upon the same basis is an establishment of religion and violates the guarantees of the First Amendment and the Due Process clause of the Fifth Amendment."

I believe this question is in the case and should be squarely met by the majority before it concludes that the conviction should be affirmed. Indeed, it is futile to affirm without deciding this constitutional issue for, unless decided here, it can be immediately renewed in a proceeding under 28 U.S.C. § 2255 (1964). As indicated below, the only reason I do not grapple with that constitutional issue in this dissent is because I would reverse on other grounds.

As the majority points out in the note attached to their opinion, any application for relief on this ground under 28 U.S.C. § 2255 would be met by several adverse holdings of this court. But experience teaches that constitutional pronouncements by the courts are always open for reconsideration. The Ninth Circuit decisions cited in the note to the majority opinion seem to rest, in the final analysis, on the reasoning that whatever the Government may take away altogether (such as exemption from military service) it may grant on any condition it chooses (such as religious training and belief). I do not believe this reasoning is acceptable in the present constitutional climate.

While deferment on the ground of conscientious objection is a privilege, it cannot be granted or withheld on unconstitutional grounds. *United States v. Seeger*, 2 Cir., 326 F.2d 846, 851, affirmed on other grounds, 380 U.S. 163. See also, *Sherbert v. Verner*, 374 U.S. 398, 404-405, and note 6 and cases there cited; *Baggett v. Bullitt*, 377 U.S. 360, 380; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606. The majority recognizes this when it discusses, on the merits, the first of the two constitutional questions referred to above.

The dimensions of the constitutional problem which the majority opinion does not discuss become clear when note is taken of relevant observations in past decisions of the Supreme Court.

In *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, the Supreme Court said:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess *a belief or disbelief in any religion*. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." (330 U.S., at 15-16, emphasis supplied)

This language was quoted with approval in *McCollum v. Board of Education*, 333 U.S. 203, 210, in which the Court rejected a strenuous effort to have the quoted language disregarded as dicta, or to have it repudiated. In *Torcaso v. Watkins*, 367 U.S. 488, the Supreme Court again quoted the *Everson* language with approval, and added:

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force

a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (367 U.S., at 495, footnotes omitted and emphasis supplied)

The broad interpretation given by the Supreme Court in *Everson* to the Establishment Clause of the First Amendment, was again approved in *McGowan v. Maryland*, 366 U.S. 420, 442. And in *Abington School District v. Schempp*, 374 U.S. 203, 216, the Supreme Court, once more quoting *Everson*, stated that it has "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."

None of these Supreme Court decisions dealt with the constitutionality of the "religious training and belief" provision of section 6(j) of the Act now in question. But, to say the least, the rationale of these other decisions provides fodder for a strong argument that the "religious training and belief" provision of section 6(j) cannot withstand a constitutional challenge.

It is in this setting that I turn to the first question dealt with by the majority on this branch of the case. But for the majority holding that the Appeal Board denial of I-O and I-A-O classifications has a basis in fact because there is evidence to indicate that Welsh's conscientious objections are not premised on "religious belief," we would not have to reach the constitutional questions. It may be added that it is acceptable appellate practice to give statutory language a broad or narrow reading if, by so doing, the constitutionality of the statute can be saved. In effect, this is what the Supreme Court did in *Seeger*, in construing the term "Supreme Being." As Justice Douglas said in his concurring opinion in that case:

"The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a *tour de force* if we construe the words 'Supreme Being' to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States v. Rumely*, 345 U.S. 41, 47." (380 U.S. at 188, footnote omitted)

In holding that there is a basis in fact for the Appeal Board's determination that Welsh's conscientious objection is not based on religious training and belief, the majority reasons: (1) that, under *Seeger*, the sufficiency of a registrant's conscientious objection is to be measured by the *strength* of the objection plus the *source* of the objection; (2) Welsh's objection has the requisite strength, as the Government concedes; but (3) his objection does not have the requisite source, because it is not premised upon a religious belief.

I agree that, under section 6(j) of the Act, as construed in *Seeger*, the conscientious objection must be of a religious nature. But, having regard for all of the circumstances of this case, I do not believe that there is a basis in fact for a determination that Welsh's objection was not of a religious nature in the statutory sense.

It is now necessary to review, in considerable detail, the statements made by Welsh, in the administrative proceedings, concerning the basis of his conscientious objection.

In his conscientious objector form, signed on April 24, 1964, Welsh struck the words "my religious training and"

from the statement of the source of his conscientious objection. He checked the "no" square opposite the question, "Do you believe in a Supreme Being?" In one item of this form, Welsh was requested to describe the nature of his belief and whether his "belief in a Supreme Being involves duties which to you are superior to those arising from any human relation." The quoted portion of this item was not applicable to Welsh because he had already indicated that he did not believe in a Supreme Being. This probably explains why, in an attached sheet giving his answer to this inquiry, Welsh stated that his belief that one should abstain from violence toward another person:

"is not 'superior to those arising from any human relation.' On the contrary, it is essential to every human relation." (Emphasis in original.)

In this attached sheet Welsh added that he could not conscientiously comply with the Government's insistence that he assume duties which he feels "are immoral and totally repugnant." In answer to another inquiry in this form, Welsh attached another sheet stating, among other things, that he came to his realization that it is wrong to wilfully kill or injure another through a series of conversations with a number of pacifists.

At the time Welsh made these statements, section 6(j) defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. . . ." The "Supreme Being" provision of the religious test was dropped from section 6(j) on June 30, 1967. 81 Stat. 100-104.

The Supreme Court did not decide *Seeger* until March 8, 1965. In that decision, 380 U.S. 163, the Supreme Court made it clear that one could have a religious belief

within the meaning of section 6(j) of the Act without believing in a Supreme Being as that term is usually understood.

The *Seeger* decision had been issued when Welsh next made statements to the administrative agency concerning the basis of his conscientious objection, in a letter dated June 22, 1965. Apparently by that time he had been told that the term "Supreme Being," as used in the statute, may have a broader meaning than he had originally supposed. Nevertheless, as indicated by footnote 3 in that letter, Welsh was still puzzled concerning the extent to which, if any, the "Supreme Being" clause affected the "religious training and belief" test of section 6(j).

In his letter of June 22, 1965, Welsh went on to explain that it is his belief that each of us possesses "some sort of ethical apparatus, a conscience, if you will." Expressing the view that it is impossible to assert the absolute truth or falsity of an ethical law Welsh adds, in a footnote, extensive quotations from Ludwig Wittgenstein, *Logisch-philosophische Abhandlung*, Routledge & Kegan Paul, London, 1963, page 145, translated by D. F. Pears and B. F. McGuinness. Among the quotations thus approved by Welsh is one to the effect that the sense of the world must lie outside the world. According to this writer,

"If there is any value that does have value, it must lie outside the whole sphere of what happens and is the case."

"Ethics is transcendental."

At a later point in this letter, Welsh states that, in our failure to recognize the political, social and economic realities of the world we, as a nation, fail our responsibility as a nation. He also inquires, "To what degree are we

economically and socially committed to 'look for' aggression?" He added, in another footnote, "I am afraid reason has already subverted my commitment to the military ethic."

On July 15, 1965, Welsh was interviewed by Owen J. Brady, a Department of Justice Hearing Officer. During that inquiry, Welsh submitted a copy of his letter of June 22, 1965, as "Exhibit A." In a six-page letter dated August 23, 1965, the Department of Justice gave the Appeal Board a report based on this inquiry. Among other things, this report recites that Welsh attended a Sunday School weekly from age twelve to age sixteen or seventeen, but had not attended a church since then, except on five or six occasions. According to this report, Welsh stated that his mother made him attend Sunday School and he "never got anything out of it."

Based on his questioning of Welsh, the Hearing Officer reported that Welsh has no belief in the existence of God or a Supreme Being, but believes in the "natural law" as a force outside of men, such force not being an entity. According to the Hearing Officer, Welsh described "natural law" as laws affecting the relationship of human beings such as the feeling of gregariousness; and was of the view that ethics are implicit within us governing the conduct of individuals. Welsh, the report states, does not believe in a life after death or in what might be called a human soul.

The report states that Welsh reiterated that he did not believe in taking a human life but he did not see it as a moral or religious wrong but simply as a social "error," or illogical act. The Hearing Officer reported that several times Welsh denied that any of his thinking had a religious basis. Welsh, according to this report, stressed that his opinions have been formed by reading in the fields of history and sociology, and that they are purely "natural" as

opposed to religious. The Hearing Officer found that the registrant is sincere in his convictions but that his ideas are incomplete and are in the process of formulation. The Hearing Officer found no religious basis for the registrant's conscientious objector claim.

On October 13, 1965, Welsh wrote an eight-page letter to the Appeal Board commenting upon the Department of Justice report summarized above. Among other things, Welsh stated in his letter:

"... I assumed Mr. Bradley was using the word 'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious.' I do believe the taking of life—anyone's life—to be morally wrong. It is not anyone's business to take anyone's life."

In this letter, Welsh also made the following significant comments:

"... I certainly do not mean to imply, that the religious training I received there [in Sunday School] had *nothing* to do with the ethical or moral values I live by." (Emphasis in original.)

"... Mr. Bradley insisted upon describing what I called 'natural law' as a 'force,' whereas I simply meant 'natural law' to be taken as 'the laws of nature.' The laws of nature are 'outside,' or beyond the control of men, but it is to perpetuate a semantic absurdity to characterize either 'natural law' or 'force' as an 'entity,' and in trying to avoid doing so I may have caused Mr. Bradley to misunderstand me."

"... I believe both ethical and religious values usually arise from the same source: the individual's concern for other individuals."

"... This concern [each individual's concern for the rest], it seems to me, is implicit in all religious belief,

even the most primitive, where, though its expression seems sometimes to be bizarre, it still acts to govern people's relationships, one to another."

"This, I suppose, is the crux of my problem of explaining my beliefs in religious terms. Perhaps I erred in taking such pains to point out that I do not believe in the 'standard notion' of God. I think my beliefs could be considered religious, in the sense I have just explained. I do not *call* myself religious, simply because most people then assume that I believe in God, in the conventional sense." (Emphasis in original.)

These observations by Welsh are in the last statement he filed in the administrative proceeding and are the best evidence of the nature of his conscientious objection. In appraising them we should give heed to this statement in the Seeger opinion:

"While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

"Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." (380 U.S. at 184).

It seems to me that, read as a whole, with particular emphasis upon his last statements, Welsh's disclaimer of a religious motivation was predicated upon a misunderstanding of the statutory meaning of the term, as construed in *Seeger*. When he fully realized the broad reading which *Seeger* gave to that term, Welsh made it clear that he did

have a religious motivation. Accepting that premise, the fact that his belief was also predicated in part on political, sociological or philosophical views, is immaterial. Likewise, although Welsh may have predicated his belief to a substantial extent on a personal moral code, that was not the sole basis of his belief. As the Supreme Court said in *Seeger*:

"We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a 'merely personal' moral code." (380 U.S. at 186).

See, also, *Fleming v. United States*, 10 Cir., 344 F.2d 912, where the court said:

"As we read the *Seeger* case, it clearly lays down the rule that before a conscientious objector classification may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code', those factors must be the sole basis of his claim for the classification." (344 F.2d at 915-916).

It is important to remember that the statute does not distinguish between externally and internally derived beliefs. *Seeger*, 380 U.S. at 186. Once it is determined that the basic belief does not derive exclusively from political, sociological or philosophical views, or a purely personal moral code, the source of the belief ceases to be a relevant subject of inquiry. The question then is only whether it

is held with the requisite strength. Under *Seeger*, 380 U.S., at 176 and 184, it is held with the requisite strength if it occupies the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.

As I appraise this record, there is no basis in fact for holding that Welsh's beliefs on which his conscientious objection is premised, do not occupy this place in his life. He is willing to go to jail rather than do violence to his beliefs, which is more than can be said for many who profess a belief in a Supreme Being.

Moreover, I am not sure that the correctness of the Appeal Board's determination as to the adequacy of Welsh's beliefs is to be judged by whether there is any basis in fact for such determination. The Supreme Court did not seem to apply such a measure in applying the principles announced in *Seeger* to the three cases decided under that title. It is probably just a question of whether the Appeal Board applied the right test. In my opinion it did not.

I thus do not reach the critical constitutional question of whether the "religious training and belief" provision of section 6(j) of the Act, as here applied, violates the "Establishment of Religion" Clause of the First Amendment. The result reached by the majority represents a negative answer to that constitutional question, but the majority has not said why.

I would reverse.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Excerpt from Proceedings of Monday,
September 23, 1968

Before: HAMLEY and ELY, Circuit Judges, and POWELL,
District Judge

**Order Directing Filing of Opinion and Dissenting Opinion
and Filing and Recording of the Judgment**

ORDERED that the typewritten opinions this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment to be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Excerpt from Proceedings of Friday,
January 31, 1969

Before: HAMLEY and ELY, Circuit Judges, and POWELL,
District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court,
IT IS ORDERED that the petition of Appellant filed October 7, 1968 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D**Amendment 1**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Universal Military Training and Service Act of 1951,
As Amended (50 U.S.C.A. App. § 456 (j))**

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work

contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to non-combatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If

after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1218

ELLIOTT ASHTON WELSH, II, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 404 F. 2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968. A petition for rehearing was denied on January 31, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 1, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Selective Service Act may constitutionally be applied to require induction into the

(1)

Armed Forces of a registrant who declares his opposition to military service on nonreligious grounds.

2. Whether the Armed Forces have authority to induct a registrant who refuses to reexecute an Armed Forces Security Questionnaire at the induction station.

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was found guilty of refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462. On June 1, 1966, he was sentenced to imprisonment for three years. On appeal the conviction was affirmed. (Pet. App. A1-A15), one judge dissenting (Pet. App. A15-A27).

The evidence showed that on February 2, 1960, petitioner registered with Local Board No. 92 in Los Angeles County, California (Exh. 1).¹ In December 1961, he was classified I-A, a classification he acknowledged when he applied for and received permission to depart the United States for a one-year period (Exh. 8). On March 27, 1964, he was ordered to report for a physical examination (Exh. 8). In April 1964 he requested exemption from combatant training and service on the special form for conscientious objectors, stating that he was "conscientiously opposed to participation in war in any form." In completing this form, he struck out religion as a basis for his opposition and also answered that he did not

¹ "Exh." refers to petitioner's Selective Service file, which was introduced into evidence as government's Exhibit 1.

believe in a Supreme Being.² On May 12, 1964, the Local Board granted this requested exemption and classified him I-A-O (Exh. 11, 16-17). On May 25, 1964, he wrote a letter stating that he wished to appeal the classification and asked for a personal appearance before the local board. For the first time, he expressed opposition not only to combatant service but to non-combatant service as well, saying that any participation in the Armed Forces would implicitly condone and contribute to the mission of the military (Exh. 26). After his appearance, the local board advised him that since he had appealed his classification, the Appeal Board would decide whether he qualified for a non-combatant or I-O classification (Exh. 29). He thereafter again appealed his classification (Exh. 31). In July 1964, the Appeal Board tentatively determined that petitioner should not be classified I-O, or in a lower class (Exh. 37).

In July 1965 petitioner personally appeared before a Department of Justice hearing officer who found that there was "no religious basis" for petitioner's conscientious objector's claim. The hearing officer concluded, therefore, that petitioner's objection to military service did not come within the statutory exemption. In August 1965, the Department of Justice accepted this recommendation and so advised the Appeal Board (Exh. 42). On October 13, 1965, petitioner wrote to the Appeal Board, contending that his anti-war beliefs should be considered religious in nature because he viewed "both ethical and religious

² On May 8, 1964, he was found fully acceptable for induction into the Armed Forces.

values [as] aris[ing] from the same source: the individual's concern for other individuals" (Pet. App. A24).

On November 15, 1965, petitioner was classified I-A by the Appeal Board and his file was returned to the local board (Exh. 68). On November 22, 1965, he was ordered to report for induction. On November 30, 1965, his employer requested a postponement of induction, stating that petitioner's specific assignment as a mathematician and scientific computer programmer "involves the entire responsibility for the scientific programming of a computer which is utilized as a turbojet engine analysis of several military aircraft which are being utilized in Viet-Nam at this time." After this request was denied, petitioner reported to the induction center on December 8, 1965, and refused to step forward for induction (Exh. 104).

ARGUMENT

1. Petitioner contends that, as applied to him, the statutory standard which grants exemption to any person from military service "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" (50 U.S.C. App. 456(j)) violates the Establishment Clause of the First Amendment. The majority of the court below refused to decide that issue because it found the question was neither briefed nor argued in petitioner's opening brief (Pet. App. A15). It held that since petitioner himself had denied that his objection to war was premised on religious belief, the Appeal Board could take him at his word and conclude that he

failed to meet the statutory standard. The dissenting judge, although he would have met the constitutional question if necessary, was of the view that, in light of *United States v. Seeger*, 380 U.S. 163, petitioner's objections to war were sufficiently of a religious nature to qualify him for a I-O classification.

The majority opinion was correct in holding that there was a basis in fact for the conclusion that petitioner's beliefs have no religious foundation. As to the constitutionality of the statute, this issue is before the Court in *Vaughn v. United States*, No. 1493 Misc., this Term, and is also presented in *McQueary v. United States*, No. 1813 Misc., this Term. In addition, the government has noted an appeal to this Court from the ruling of Judge Wyzanski in *United States v. Sisson* (D. Mass., decided April 1, 1969), which presents a similar question. We adhere to the position taken in our opposition in *Vaughn*—that Congress, consistent with the First Amendment, may exclude from conscientious objector status those whose opposition to war stems, in the words of Section 6(j), from "essentially political, sociological, or philosophical views or a merely personal moral code." We recognize, however, that, as to that issue, this case will presumably be governed by the disposition in *Vaughn*, *McQueary* and *Sisson*.

2. Petitioner executed an Armed Forces Security Questionnaire in April 1964. When he appeared for induction in December 1965, he refused to reexecute this form. Army Regulation 601-270 provides, in paragraph 80, that no one who refuses to execute a secur-

ity questionnaire shall be inducted into the Armed Forces pending completion of an investigation. The regulation also limits the validity of a completed security questionnaire to a period of 120 days. Petitioner claims that he was denied due process of law when induction station personnel ordered him to step forward to be inducted without first conducting a security investigation. As the court of appeals concluded (Pet. App. A12-A13), rejection of a registrant by the Armed Forces for security reasons is wholly for the benefit of the Army and may be waived. Petitioner, therefore, has no basis for complaint in this regard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1969.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 76

ELLIOTT ASHTON WELSH, II,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported (404 F.2d 1078). It also appears in the record [R.] and in the separately printed single Appendix. It was written by District Judge Powell. A dissenting opinion was written by Circuit Judge Hamley. No opinion was written by the district court.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1968. The time for filing this petition for writ of certiorari was extended to April 1, 1969 by Mr. Justice Douglas. The petition for writ of certiorari was filed within the extended time. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

STATUTES AND REGULATIONS INVOLVED

(Italics Supplied)

Section 1(c) of the Universal Military Training and Service Act (50 U.S.C. App. § 451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is *fair and just*, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a), 65 Stat. 75.

Section 6(j) of the act (50 U.S.C. App. § 456(j)), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of *religious* training and belief, is conscientiously opposed to participation in war in any form. *Religious* training and belief in this connection means an individual's belief in a relation to a Supreme Being involv-

ing duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if

the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U.S.C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 1622.14 of the Selective Service Regulations (32 C.F.R. § 1622.14 (amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952)) provides:

"Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant

and noncombatant training and service in the armed forces."

Section 1625.2 of the Selective Regulations (32 C.F.R. §1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

*"When registrant's classification may be reopened and considered anew.—*The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1626.25 of the Selective Service Regulations (32 C.F.R. § 1626.25 (E. O. 10363, 17 F. R. 5456, June 18, 1952)) provides:

"Special provisions when appeal involves claim that registrant is a conscientious objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant.

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The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C.F.R. § 1626.26 (1951 Rev.)) provides:

"*Decision of appeal board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *provided*, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

The basic question in this case is between "religious" conscientious objections and "non-religious" conscientious objections.

1. Is Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. § 456 (j)), as amended by Congress in 1948, and in 1951 invalid, as in violation of the "Establishment of Religion" and "Free Exercise of Religion" clauses of the First Amendment of the United States Constitution and, also, of the "Due Process" clause of the Fifth Amendment thereof?

2. Whether, in granting an exemption from training and service in the armed forces of the United States to any person who is conscientiously opposed to participation in war in any form, Congress, constitutionally, could require, as a condition and in limitation of such exemption, that such person's conscientious objections must be based upon "religious" training and belief.

3. Whether it is mandatory for the government agency concerned (the Army) to follow its regulations at the Armed Forces Examining and Entrance Station, in the processing of a Selective Service System registrant present for the purpose of induction.

STATEMENT OF THE CASE

(1) Concerning the trial:

The indictment charged Welsh with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 2].

Welsh pleaded "not guilty" and was tried by the Honorable Russell E. Smith, District Judge, sitting alone without a jury. He was found guilty and sentenced to imprisonment for a period of three years [CT 7].

A written Motion for Judgment of Acquittal was filed during the trial [CT 5 and RT 12, lines 11-20].²

(2) Concerning the agency processing:

In December, 1961, Welsh registered with the Selective Service System [E 4].³

On April 10, 1964, Welsh requested and was given a Special Form for Conscientious Objector, SSS Form 150 [E 16]. This form was executed and returned to the local board on April 24, 1964 [E 17]. He signed that portion of the Form 150 applicable to objectors to combatant training. He altered this statement by striking out the words "my religious training and" so that the statement read:

"(A) I am, by reason of belief, conscientiously opposed to participation in war in any form. I therefore claim exemption from combatant training and service in the Armed Forces. /s/ Elliott A. Welsh, II" [E 17].

He answered the question, "Do you believe in a Supreme Being?" by putting an "X" in the box marked "no". He

2. RT refers to the Reporter's Transcript.

3. "E" refers to government Exhibit 1, Welsh's Selective Service file.

attached a note explaining the nature of his beliefs [E 21 and 22].

On May 12, 1964, his local board granted him a classification of I-A-O [E 11, line 7 of Minutes of Action].

On May 25, 1964, he sent the local board a letter amending his Form 150 to request classification in Class I-O, claiming exemption from both combatant and non-combatant training and service [E 26] and requesting a personal appearance.

The local board hearing was held on June 9, 1964. The local board's resume of this "personal appearance" indicates its summary nature [E 29]. Welsh later testified that it took 30 to 45 seconds altogether [RT 18]. He mailed to the local board a letter which they received on June 19, 1964, strongly protesting their refusal to consider his re-classification claims [E 31 to 33].

An appeal was taken to the Appeal Board. The Department of Justice Hearing Officer, Mr. Owen J. Brady, interviewed Welsh on July 15, 1965. A copy of this Hearing Officer's full report was introduced into evidence at the trial as "Defendant's Exhibit 3" [RT 21, line 15], and is included with the Transcript of Record upon this appeal. The Hearing Officer concluded that Welsh was sincere in his conscientious objection to war but that he "could find no religious basis for the registrant's beliefs, opinions and convictions." [DE 7]. He recommended that petitioner's claim be denied both as to combatant and to non-combatant training and service.

The Department of Justice furnished the Appeal Board with a six page letter, containing excerpts from the Hearing Officer's report and stating the recommendation that Welsh be denied classification in either Classes I-O or I-A-O [E 39 through 44]. Full copies of the FBI report

on petitioner and of the Hearing Officer's full report on petitioner were not furnished to the Appeal Board [RT 27 and 28]. Neither were these reports furnished to Welsh although this had been requested by him [RT 22, line 6], until the trial, when the Hearing Officer's report alone was given to his counsel [RT 20, lines 22 and 23]. Thus Welsh did not have this data at the time he prepared his rebuttal to the Department of Justice recommendation, as provided by the regulations [E 60 through 67].

Welsh sent the Appeal Board an eight page letter explaining his belief in relation to the question of the existence of a "Supreme Being." The Appeal Board clerk told him that she would make a "summary" of this material and present it to the Appeal Board [RT 23, lines 15 to 22].

While this appeal was pending, his wife became pregnant. He conveyed this information to the clerk of the local board and was told "if we want any more information from you, we will send you a form." [RT 19, lines 11 to 17]. No Current Information Questionnaire was sent to petitioner [RT 20, lines 10 to 12]. The Appeal Board decision reclassifying Welsh I-A arrived two days later [RT 20, line 5] and the Order to Report for Induction came three days after that [RT 20, line 9].

Welsh reported to the Induction Station on December 5, 1965, as ordered [RT 23, line 23 et seq.]. His Form DD 98, the Armed Forces Security Questionnaire, had been executed over one year prior to the date of induction [E 87 through E 90], on April 30, 1964. He told the Induction Station personnel that he could not re-execute the DD Form 98, as it had been made out the year before, because some things had changed and his answers would be different [RT 24, lines 19, 20].

He was not given a new DD 98 to fill out but was taken to an upstairs room and given an opportunity to submit to induction [RT 24, line 12, to RT 25, line 12].

Welsh refused induction [RT 25, lines 19 to 22].

ARGUMENT

I

The Act of Congress Violates the First Amendment Prohibition of Establishment of Religion.

The First Amendment states Congress can "make no law respecting an establishment of religion, or prohibiting the free exercise thereof".

The Act of Congress, under which petitioner Welsh was processed, tried and convicted termed the Universal Military Training Service Act of 1951, at 50 U.S.C.A., App., 456 (j), so far as relevant provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, *by reason of religious training and belief*, is conscientiously opposed to participation in war in any form. *Religious training and belief* in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *" (Italics supplied).

It may be helpful to give the history of the pertinent parts of our recent draft laws:

The 1940 Act of Congress, Section 5(g) of the law termed the Selective Training and Service Act of 1940 (54 Stat. 885, 889), provided:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

The 1948 Act, in Section 6(j) of the law termed the Selective Service Act of 1948 (62 Stat. 604, 612-3), which is identical with § 6(j) of said 1951 Act here under discussion, Congress substituted "armed forces" for "land or naval forces" in the above quotation from the 1940 Act, and added thereto the following amendment:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."

Our position is that the applicable statute, in its Section 6 (j), inherently, and as applied to deny petitioner Welsh an exemption, is violative of both the "Establishment Clause" and the "Free Exercise Clause" of the First Amendment.

As a first step in our argument we point out—

(1) Congress, by this amendment, restricted prior definitions and concepts of "religious training and belief" to only a "belief in a relation to a Supreme Being."

(2) This Court, by its decision in *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850 (1965), in effect eliminated the necessity of belief in a Supreme Being and explicitly construed the beliefs of the men involved (Seeger, Jakobson, and Peter) to be within the intent of the Act.

It is now left for us to argue that if the beliefs of petitioner Welsh are not also to be construed as "religious" that the intent of Congress offends the First Amendment.

A. Welsh can be considered the possessor of "religious" beliefs.

Welsh disavowed belief in a Supreme Being [Ex. 17] and also "materially altered" the SSS Form No. 150 [the expression "materially altered" being the characterization of Seeger's conduct by the Second Circuit in *Seeger v. United States*, 2nd Cir., 1964, 326 F.2d 846].

Welsh struck out "my religious training and" so that the statement now read "(A) I am, by reason of belief, conscientiously opposed to participation in war in any form. I therefore claim exemption from combatant training and service in the Armed Forces. /s/ Elliott A. Welsh, II" [E 17].

He attached explanations of his beliefs [Ex. 21, 22].

Nevertheless, we pose this question: is a man to be judged solely by his own estimations?

The answer to this question must be no. Considerable weight is to be given to them but, just as in matters before this Court, all such issues are to be finally determined by constituted authority, not by interested parties.

Without cataloging, and arguing, the contents of the record, we submit that Welsh, like Seeger, et al., can be held to have a religious basis for his scruples. One writer on this subject, H. Patrick Sweeney, referring to *Torcaso v. Watkins*, 367 U.S. 488 (1961), says "The *Torcaso* opinion supports the view that belief in a system of ultimate moral values that bind the conscience is a form of religious belief within the meaning of the first amendment."*

*Loyola University Law Review, Vol. 1, p. 118 (1968).

This appears to essentially have been the conclusion of Circuit Judge Hamley, the writer of the dissenting opinion starts [1086]. He points out, too,

"It is important to remember that the statute does not distinguish between externally and internally derived beliefs. *Seeger*, 380 U.S. at 186; 85 S.Ct. 850. Once it is determined that the basic belief does not derive exclusively from political, sociological or philosophical views, or a purely personal moral code, the source of the belief ceases to be a relevant subject of inquiry. The question then is only whether it is held with the requisite strength. Under *Seeger*, 380 U.S., at 176 and 184, 85 S.Ct. 850, it is held with the requisite strength if it occupies the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption." [1092].

B. Alternatively, Welsh need not be considered "religious" to prevail because the Act creates an impermissible distinction, in awarding statutory deferments, between sincere conscientious objectors who are non-religious and those who are "religious."

Welsh was found to be sincere by the Hearing Officer [Def. Ex. 3, RT 21, line 15]; no question has been raised as to his sincerity, and we believe none will be raised by the respondent.

Sincerity, alone, was the standard used by the British when they had conscription [See Appendix A]. Thus, a Welsh nationalist could be classified as a conscientious objector. This is the standard currently used by the Commonwealth of Australia [see Appendix B]. Its most pertinent paragraph says: "(5) For the purpose of this section, a conscientious belief is a conscientious belief whether the ground of the belief is or is not of a religious character and whether the belief is or is not part of the doctrines of a religion."

Similar provisions were present when draft laws existed in Canada, New Zealand, Germany (west), the Scandinavian countries and Holland and Finland.

Sincerity, alone, is the only constitutionally permissible standard. If it be asserted that Congress may proscribe beliefs (in our context) that are solely political, economic, sociological or philosophical we reply (1) there has been no claim that Welsh's beliefs were such, (2) that even if his pertinent beliefs are held to include such proscribed bases this would not taint his claim.

The Tenth Circuit so interpreted this Court's *Seeger* decision in *Fleming v. United States*, 10th Cir., 1965, 344 F.2d 912.

It is an impermissible preference to favor conscientious objectors who base their beliefs on religious grounds as against equally sincere beliefs held by men not claiming a religious basis for them.

C. Establishment cases.

The now long line of decisions by this Court, in "establishment" cases supports our view:

Torcaso v. Watkins, 367 U.S. 488 (1961)—

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on belief in the existence of God as against those religions founded on different beliefs (11)" [495].

"(11) Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism,

Ethical Culture, Secular Humanism and others. See *Washington Ethical Society v. District of Columbia*, 249 F.2d 127; *Fellowship of Humanity v. County of Alameda*, 153 C.A.2d 673, 315 P.2d 394; II *Encyclopedia of the Social Sciences* 293; 4 *Encyclopedia Britannica* (1957 ed.) 325-237; 21 *id.*, 797; *Archer, Faiths, Men Live By* (2d ed. revised by Purinton), 120-138, 254-313; 1961 *World Almanac* 695, 712; *Year Book of American Churches for 1961*, at 29, 47."

In *Torcaso*, a commission as a notary public was denied him because he would not declare his belief in God, as required under the State Constitution. This Court held that that State law violated the "Establishment Clause" of the First Amendment. The language quoted above from *Torcaso* was reiterated and reaffirmed in *Abington School District v. Schempp*, 374 U.S. 203, 220 (1963).

Earlier, this Court in several of its decisions preceding *Torcaso* took the same position and reaffirmed it in several subsequent decisions.

Everson v. Board of Education, 330 U.S. 1 (1947):

"The 'establishment of religion clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. * * * In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'." (Italics supplied).

In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948) this Court was requested and

specifically refused to repudiate as *dicta* the above-quoted, *Everson* interpretation of the scope of the First Amendment's coverage and reiterated the *Everson* statement as to the meaning of the establishment of religion clause. See, also *Zorach v. Claiborn*, 343 U.S. 306, 312, 314-15 (1952), which followed the *McCullum* case. Said *Everson* statement was again reaffirmed in the *Torcaso* case, *supra*, in *McGowan v. Maryland*, 366 U.S. 420 (1961), in *Engel v. Vitale*, 370 U.S. 203 (1963). These principles are now "universally recognized", said this Court in *Schempp* (at page 220).

It is submitted that it is now but a short and reasonable step, after construing the First Amendment as prohibiting the preference of one religion over others to hold that it prohibits the preference of religious over non-religious persons in the bestowing of draft classifications. It is further submitted that the Court, in its past decisions, in effect took that short step when the alleged "*dicta*" in *Everson* was not repudiated in *McCullum*, but, on the contrary, was specifically reiterated.

D. Free exercise cases.

Cantwell v. Connecticut, 310 U.S. 296, 303-4 (1940), decided under the "Free Exercise Clause", says:

"Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

We invite attention to the choice of words used: "Freedom of conscience. . . cannot be restricted by law."

Engel, supra, is of special interest:

"The *Establishment Clause*, unlike the *Free Exercise Clause* does not depend upon any showing of

direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. * * * The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." (Italics added) (at pp. 430-432).

Schempp, supra, caused the Court to review again its prior decisions in this field; the above noted principles of law were reaffirmed. The Court not only reiterated the language from *Torcaso* (at pp. 221-2), but stated further, as follows:

"In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule required interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment." (at p. 226).

We believe *Schempp*, in the above paragraph, stated our case:

"In the relationship between man and religion. . . ."

If it be thought that petitioner Welsh attacks religion, or is out of line with current "religious" thought, or disputes that in our society freedom of religion takes primacy among all the freedoms our nation cherishes quite the opposite is true.

The position of petitioner Welsh is mirrored by many of our great religions: freedom of thought.

More explicitly we quote from the Methodist position:

"c. Christians cannot complacently accept rights or privileges accorded to them because of their religious views but denied to others equally sincere who do not meet a religious test. So long as military conscription legislation remains in effect, we believe that all those who conscientiously object to participation in all wars should be granted recognition and assigned to appropriate civilian service regardless of whether they profess religious grounds as the basis of their stand."*

Also not present here is the political question of whether Congress must grant deferments or exemptions only, having decided that deferments and exemptions are desirable Congress may not favor "religious" over non-religious persons.

Nor is there present any problem of imperative necessity. The data published by the Selective Service System, in every issue of its monthly tabloid **SELECTIVE SERVICE** supports our conclusion. This publication shows the following: over 38,000,000 men have been registered since 1948; 33,000 have been classified I-O (completely deferred

*See Appendix C.

from *military* national service). A very much smaller number of men, professing conscientious objection, but who (for one reason or another not being so classified by the System) have gone to prison for refusal to submit to induction. This latter group were, in nearly all instances, men professing that they were religiously motivated. It is unreasonable, we submit, to believe that, at the most, more than an equal, additional number of other registrants would put their non-religious pacifist beliefs to the double test, that is, (1) risk prison and thereafter (2) shoulder the burdens of a conscientious objector in our society.

Nor is the test of sincerity more difficult to apply. If a local board doesn't like the demeanor of a registrant a negative answer to his application, after his meeting with the board, could completely demolish his case because it is almost entirely a subjective matter and a finding of insincerity would settle this point. Presently, when religious belief is the test, nearly all applicants have letters from "experts" (his minister, Sunday School teacher) that his beliefs are religious. The board never has counter-affidavits to support its adverse conclusion.

II

The Act Violates the Fifth Amendment Due Process Clause.

In its consideration of *Seeger v. United States*, 326 F.2d 846, the Second Circuit concluded that Congress had created an "impermissible classification," referring to the inclusion of the so-called "Supreme Being Clause" in the 1948 Act. The reasoning of this Court of Appeals is applicable to our situation.

"We further recognize the concern for personal liberties and religious freedom which led to the enactment of the conscientious objector exemption in the face of the perils which confront us throughout the

world. At the same time, however, we cannot conclude that specific religious concepts, even if shared by the overwhelming majority of the country's organized religions, may be selected so as to discriminate against the holders of equally sincere religious beliefs. Especially when considered in the light of *Torcaso* and the still more recent teachings of the Supreme Court..." [854].

"Equal protection under the law" is a time honored concept. It is part of the Fifth Amendment despite the fact this amendment contains no such explicit statement, as does the Fourteenth Amendment. *Bolling v. Sharpe* 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954):

"But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

Footnote 2: *Detroit Bank v. United States*, 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304; *Curran v. Wallace*, 306 U.S. 1, 13-14, 59 S.Ct. 379, 386, 83 L.Ed. 441; *Steward Machine Co. v. Davis*, 301 U.S. 548, 585, 57 S.Ct. 883, 890, 81 L.Ed. 1279.

Section 6 (j) of the Act (supra), making a conscientious objector classification one that must be based on religion marks an entrance by Congress into a field of legislation prohibited by the Constitution. Even if it is claimed to be a reasonable discrimination such an argument doesn't meet the constitutional test. Nor is the argument valid that the conscientious objector classification is a privilege granted by Congress and that it is not a right de-

rived from the Constitution. What privileges Congress gives must be given with a fair and equal hand.*

III

Offering the Loyalty Oath Is Mandatory.

The defendant was denied due process of law when the armed forces examining and entrance station ordered him to submit to induction without first giving him an opportunity to accomplish the security questionnaire, DD Form 98 as the regulations provide.

32 Code of Federal Regulations, Section 1632.16 provides:

"1632.16 INDUCTION:—At the induction station the selected men who have been forwarded for induction and found qualified will be inducted into the Armed Forces." (Emphasis supplied).

Since there are no Selective Service System regulations on induction proceedings the Army regulations govern. *Chernekoff v. United States*, 9 Cir., 1955, 219 F.2d 721, 724, n. 12.

The pertinent Army regulation is:

AR 601-270 "Personnel Procurement, Armed Forces Examining and Entrance Stations", provides in its pertinent part:

"80. DD Form 98 (Armed Forces Security Questionnaire). A. Preparation: At the completion of the preinduction examinations all registrants, except registrants in Class I-O (conscientious objectors),

*Several law journal articles have questioned the constitutionality of Section 6 (j) not only because it discriminated between theistic and non-theistic conscientious objectors but, also, because it discriminates between religious and non-religious conscientious objectors, regardless of their sincerity and good faith. 50 Va.L.Rev. 178, 182-3; 64 Col.L.Rev. (No. 5), 938, 948, 950 (1964); 48 Minn.L.Rev. 770-71, 775-78 (1964); 82 Harv.L.Rev. 1680 (1969); 1 Loyola U.L.R. 113 (1968) etc., etc.

who are found to be militarily qualified for service in the Armed Forces, including administrative acceptees, will be given the opportunity to accomplish the Armed Forces Security Questionnaire. DD Form 98 will not be accomplished by registrants otherwise disqualified for induction, and processing under AR 604-10 will not be undertaken for registrants who are otherwise disqualified for induction.

- (1) A commissioned officer who is thoroughly conversant with the regulations and policies pertaining to the accomplishment of the Armed Forces Security Questionnaire (DD Form 98) will be designated to have direct control over the procedures and will present the orientation established for completing the form.
- (2) Volunteers for immediate induction and previously qualified registrants being processed for induction, who have not accomplished the security questionnaire, or whose security questionnaire is invalid, will be given the opportunity to accomplish the security questionnaire prior to induction.
- (3) At the time registrants are given the opportunity to accomplish the security questionnaire, an orientation will be presented in a manner so as to insure all persons understand the importance of accomplishing the questionnaire. The orientation will consist of the informational material outlined in Appendix IV.
- (4) Individuals who are about to accomplish DD Form 98 will be fully instructed as to the importance of the entries to be made in section IV and of affixing their signatures, and the reasons their cooperation in the accomplishment of the Armed Forces Security Questionnaire is an important step at the beginning of their military service.

- (5) Each individual will be instructed and prepared to respond in accordance with his rights and understanding of the entries he is required to make. Coercion or persuasion will not be used.
- (6) Following the orientation, each individual will be directed to carefully read the entire contents of the DD Form 98 and to answer all questions in section IV by writing 'Yes' or 'No' in the appropriate columns. All entries on the DD Form 98 will be in the individual's own handwriting except where use of typed entries is specified.
- (7) Immediately following the completion of the DD Form 98, and affixing the signature by the declarant, a commissioned officer serving as the witnessing officer will affix his own signature. The practice of permitting DD Forms 98 to accumulate for later signature will be avoided. The witnessing officer may be any duly commissioned officer. It is not mandatory, however, it is preferable that he be an officer who is on duty with the induction station. Registrants will not be required to sign blank DD Forms 98 to be filled in at a later date by station personnel. This practice negates the value of DD Form 98 should the veracity of the statements therein be challenged. It also renders ineffective the penalty clause for falsification of the form.
- (8) Security questionnaires are valid for a period of 120 days. If the time element between preinduction and induction is in excess of 120 days, the following statement will be placed in the Remarks Section of DD Form 98:

I have this date, reviewed the contents of DD Form 98 prepared by myself on and certify that the statements then made by me are at this time full, true, and correct.

.....
Signature of
witnessing officer

.....
Signature

The use of a rubber stamp and red ink is recommended for this requirement. An orientation in accordance with (3) above will be required for these individuals. An examinee who qualifies or refuses to accomplish this statement will be processed as for initial examinees of these categories.

b. Disposition.

- (1) Security questionnaires which are satisfactorily accomplished by registrants will be forwarded to the appropriate Selective Service local board with other records which pertain to the individual, or, when applicable, to the military installation of initial reception.
- (2) A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (see AR 604-10) or who discloses significant derogatory information with respect to his background, or invokes constitutional privileges, and registrants admitting current membership in the Communist party ('known Communists') and registrants for whom credible derogatory information has been received from a reliable source indicating Communist party membership ('alleged Communists') as defined in AR 604-10, will not be inducted into the Armed Forces pending completion of a thorough investigation (Bold type supplied).
- (3) Investigative action as prescribed in AR 604-10 will be initiated at the induction station in all cases of registrants referred to in (2) above.
- (4) If a registrant refuses to complete part of a DD Form 98 he will be requested to enter an explanation of the refusal in the remarks section and to sign the form. A commissioned officer serving as the witnessing officer will affix his own signature. If a registrant refuses to complete any part of a DD Form 98 and refuses to enter an explanation of the refusal in the remarks section

and sign the form, the following statement will be entered in the remarks section of the form:

(Registrant's name), a registrant under the Universal Military Training and Service Act, was this date given an opportunity to execute DD Form 98 and in my presence he refused to do so.

This statement will be signed by a commissioned officer, and forwarded to the appropriate investigative agency in accordance with (3) above.

- (5) DD Form 62 prepared for registrants referred to in (2) above will contain in remarks section the notation 'Acceptability for induction held in abeyance, not presently acceptable for induction.' No other notations will be made on the DD Form 62 and no other information or papers will be released to Selective Service local boards. Entries in regard to acceptability for induction will not be made.
- (6) Item 22 on DD Form 47 pertaining to registrants referred to in (2) above will not be completed until the result of investigative action is received from higher headquarters.
- (7) Entry on SSS Form 225 (Physical Examination List) for registrants for whom investigative action has been initiated in accordance with (3) above will indicate induction being held in abeyance. Same notation as required in (5) above will be entered.
- (8) At the time final determination of the case under investigation has been made, the induction station concerned will be advised as to the appropriate action to be taken regarding the registrant whose induction is being held in abeyance. Upon receipt of information from higher headquarters indicating that registrants whose induction is being held in abeyance have been cleared for induction, the

induction station will prepare a new DD Form 62 in its entirety and forward it to the appropriate Selective Service local board. Upon receipt of information from higher headquarters indicating that registrants whose acceptability is being held in abeyance have been determined to be unacceptable for induction, the induction station will prepare a new DD Form 62 and forward it to the appropriate Selective Service local board. Original and copy of DD Form 62 prepared in accordance with (5) above, when retained, will be destroyed when the forms are accomplished."

The induction officials did not give this appellant the opportunity to qualify nor did they take any of the appropriate steps prescribed by the Army Regulation. Instead, they ordered him to submit to induction in violation of their own regulations in that they had not taken the required steps to determine if he was qualified for induction.

Note that the regulation is stated in mandatory language. See especially section B (2) set forth above. That section states that registrants in the position appellant was in on March 22, 1966, "will not be inducted".

A defendant in a draft refusal case ordinarily is required to show that he has exhausted all of his administrative remedies or he may not mount an attack on his classification as a defense in court. It is said he is required to exhaust his administrative remedies so that the courts will not be burdened with trials that might have been avoided by the defendant's success at some stage of the administrative process which would preclude his being ordered to submit to induction. The courts have often been rather rigid on this exhaustion point, requiring that the defendant go to the brink of induction, that he complete every step of the process prior to refusing actually to enter the military.

All of the arguments that support the requirement that the defendant exhaust the administrative process apply with equal vigor to the government. Shortcuts to induction taken by the government burden the courts with cases that could have been avoided altogether, to say nothing about the inconvenience and expense to the young men involved.

For this reason, as well as for the reason that deprivation of a chance to avoid the dilemma is grossly unfair to the appellant, the government should be required to exhaust the administrative opportunities for rejection that the regulations provide before forcing the registrant to induction, refusal and trial.

Finally, we point out that the "fair and equal treatment" provisions of the law have been violated by the refusal to give Welsh the security questionnaire opportunity. Especially is this so in light of his explicit concern over signing it at the time of the induction proceeding. These "fair and equal treatment" provisions of the law are set forth in the regulations, as well as in the Act:

"In classifying a registrant there shall be no discrimination for or against him because of his . . . creed . . . or because of his membership or activity in any . . . religious . . . organization. Each such registrant shall receive equal justice."

32 C.F.R. § 1622.1 (d).

CONCLUSION

This Court should hold (1) Welsh's beliefs fall within the meaning of the Act, or that (2) the Act, as applied to him, is unconstitutional or that (3) the Army erred

in applying the applicable security questionnaire procedures.

Respectfully,

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Attorney for Petitioner

November 28, 1969.

APPENDIX A
THE ACTS
OF
THE PARLIAMENT
OF THE COMMONWEALTH
OF AUSTRALIA
PASSED DURING THE YEAR
1967
IN THE FIRST SESSION
OF THE TWENTY-SIXTH PARLIAMENT
OF THE COMMONWEALTH
WITH
TABLES, CERTAIN REPRINTED ACTS
AND INDEXES
IN TWO VOLUMES
VOLUME II

National Service Act 1951-1966

* * *

29A.—(1.) A person whose conscientious beliefs do not allow him to engage in any form of military service is, so long as he holds those beliefs, exempt from liability to render service under this Act.

(2.) A person whose conscientious beliefs do not allow him to engage in military duties of a combatant nature but allow him to engage in military duties of a non-combatant nature, shall not, so long as he holds those beliefs, be required to engage in duties of a combatant nature.

(3.) Sub-section (1.) of this section applies to a person who has commenced to render service under this Act only if that person formed the conscientious beliefs referred to in that sub-section after he commenced to render that service.

(4.) Sub-section (2.) of this section applies to a person who has commenced to render service under this Act only if—

- (a) that person formed the conscientious beliefs referred to in that sub-section after he commenced to render that service; or
- (b) before that person commenced to render that service, it had been decided that that person was a person to whom that sub-section applied.

(5.) For the purpose of this section, a conscientious belief is a conscientious belief whether the ground of the belief is or is not of a religious character and whether the belief is or is not part of the doctrines of a religion.

Exemption to be decided by a court of summary jurisdiction. Inserted by No. 30, 1953, s. 3.

29B.—(1.) Where a question arises whether—

- (a) a person is, by virtue of sub-section (1.) of the last preceding section, exempt from liability to render service under this Act; or
- (b) a person is a person to whom sub-section (2.) of that section applies,

the question shall be heard and decided by a court of summary jurisdiction of a State or Territory of the Commonwealth constituted by a Police, Stipendiary or Special Magistrate.

(2.) Where a question arises whether a person is, by virtue of sub-section (1.) of the last preceding section, exempt from liability to render service under this Act, the court by which the question is heard may, if it is satisfied that the person is not so exempt but that the person is a person to whom sub-section (2.) of that section applies, decide accordingly.

APPENDIX B

**HALSBURY'S
STATUTES OF ENGLAND
SECOND EDITION
EDITOR-IN-CHIEF
SIR ROLAND BURROWS, K.C.
RECORDER OF CAMBRIDGE
VOLUME 22**

**ROYAL FORCES
SALE OF GOODS AND HIRE
PURCHASE
SALE OF LAND
SAVINGS BANKS
SET OFF AND COUNTERCLAIM
LONDON**

**BUTTERWORTH & CO. (PUBLISHERS) LTD.
BELL YARD, TEMPLE BAR, W.C.2.**

1950

National Service Act, 1948 (c. 64), s. 17

* * *

Conscientious objectors

17. Registration in register of conscientious objectors.—(1) If any person subject to registration claims that he conscientiously objects—

- (a) to being registered in the military service register, or
 - (b) to performing military service, or
 - (c) to performing combatant duties,
- he may, on furnishing the prescribed particulars about himself, apply in the prescribed manner to be registered as a

conscientious objector in a special register to be kept by the Minister (in this Part of this Act referred to as "the register of conscientious objectors"):

Provided that where, in the case of a person who has been medically examined under section eight of this Act, such an application is made more than two days after the completion of his medical examination, the Minister shall dismiss the application unless he is satisfied, having regard to the grounds on which the application is made, that the making thereof has not been unreasonably delayed.

(2) Where any person applies in accordance with the last foregoing subsection to be registered in the register of conscientious objectors, he shall, unless his application is dismissed in accordance with the proviso to that subsection be provisionally registered in that register.

(3) A person who has been provisionally registered in the register of conscientious objectors shall within the prescribed period and in the prescribed manner, make to a local tribunal constituted under the Fourth Schedule to this Act an application stating to which of the matters mentioned in paragraphs (a) to (c) of subsection (1) of this section he conscientiously objects, and if he fails to do so the Minister shall remove his name from the register of conscientious objectors.

(4) An applicant for registration as a conscientious objector who is aggrieved by any order of a local tribunal and the Minister, if he considers it necessary, may, within the prescribed time and in the prescribed manner, appeal to the appellate tribunal constituted under the Fourth Schedule to this Act, and the decision of the appellate tribunal shall be final.

(5) The Minister or any person authorised by him shall be entitled to be heard on any application or appeal to a tribunal under this section.

(6) A local tribunal, if satisfied, upon an application duly made to it under this section, or the appellate tribunal if satisfied on appeal, that the ground upon which the application was made is established shall by order direct either—

- (a) that the applicant shall without conditions be re-registered in the register of conscientious objectors; or
- (b) that he shall be conditionally registered in that register until the end of a period of [eighteen months] and sixty days, the condition being that he must until the end of that period undertake work specified by the tribunal, of a civil character and under civilian control; and

- (i) submit himself to such medical examination at such place and time as the Minister may direct for the purpose of ascertaining the applicant's fitness for that work;

- (ii) undergo such training provided or approved by the Minister as the Minister may direct for the purpose of fitting the applicant for that work;

and that at the end of that period he shall be registered in that register without conditions; or

- (c) that he shall be registered in that register as a person liable or prospectively liable under this Part of this Act to be called up for service but to be employed only in non-combatant duties;

but, if not so satisfied, shall by order direct that his name shall be removed from the register of conscientious objectors:

Provided that in relation to any person who, by reason of his age, has not yet become liable under this Part of this Act to be called up for service, any condition imposed

under paragraph (b) of this subsection shall be suspended until he attains the age of eighteen.

(7) The Minister may provisionally register in the register of conscientious objectors any person subject to registration, notwithstanding that he has refused or failed to make any application in that behalf, if in the Minister's opinion there are reasonable grounds for thinking that he is a conscientious objector, and the Minister may refer the case of that person to a local tribunal; and thereupon the provisions of this section shall have effect in relation to that person as if the necessary applications had been made by him, and references in this section to the "applicant" shall be deemed to include references to him.

(8) Any person unconditionally registered in the register of conscientious objectors by virtue of paragraph (a) of subsection (6) of this section or conditionally registered therein by virtue of paragraph (b) of that subsection shall not be liable to be called up for service so long as he is so registered.

(9) The Service Authorities shall make arrangements for securing that, where a person registered in the register of conscientious objectors by virtue of paragraph (c) of subsection (6) of this section as a person liable or prospectively liable under this Part of this Act to be called up for service but to be employed only in non-combatant duties is called up for service under this Part of this Act, he shall, during the period for which he serves by virtue of being so called up, be employed only in such duties.

(10) If, while a person is conditionally registered in the register of conscientious objectors, any change occurs in the particulars about him registered in that register, he shall forthwith notify the change to the Minister in the

prescribed manner, and if he fails to do so shall be liable on summary conviction to a fine not exceeding five pounds.
[132]

NOTES

This section reproduces s. 5 (except for sub-s. (8)) of the National Service (Armed Forces) Act, 1939 (c. 81), as amended by the National Service Act, 1941 (c. 15), s. 6 (1), (3) and Schedule, the National Service Act, 1942 (c. 3), s. 1 (3) and Schedule, the National Service Act, 1947 (c. 31), s. 17 (1), (2) and Third Schedule.

The words in square brackets were substituted for "twelve months" by the National Service (Amendment) Act, 1948, (c. 6) s. 1 (2).

Definitions. For "Minister", "prescribed", "conditionally registered" and "Service Authorities", see s. 34 (1), p. 74, *post*.

Regulations under this section. National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, Part VII. For general provisions concerning regulations, see s. 32, p. 73, *post*.

Sub-s. (1).

Person subject to registration. For the construction of references to persons so subject, see ss. 6 (2), 10 (2), pp. 47, 53, *ante*.

Military service register. See s. 7 (4) (a), p. 48, *ante*.

Prescribed particulars; prescribed manner. See the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, regs. 16, 17.

More than two days. *Semble*, for the purposes of the proviso to sub-s. (1), this means after the expiration of

two days exclusive of the day of medical examination; for computation of time, see generally 32 Halsbury's Laws (2nd Edn.) 142 *et seq.* S. 8 of this Act. See p. 49, *ante*.

Sub-s. (3), (4).

Prescribed period; prescribed manner etc. For form and time of applications to local tribunals and appeals, see the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, reg. 18 and Schedule, Parts IX and X.

Local tribunal; appellate tribunal. For general provisions concerning the procedure of tribunals, see s. 22 (1), p. 64, *post*, and the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, Part VIII. By s. 22 (2), p. 65, *post*, determinations of tribunals are not to be called in question in a court of law. For remuneration, allowances payable to members of tribunals, applicants and witnesses, see s. 22 (3), p. 65, *post*.

Fourth Schedule to this Act. See p. 106, *post*.

Sub-s. (6).

Certificate of registration. Where registration as a conscientious objector is granted, a certificate is issued in the form set out in Part VIII of the Schedule to the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683.

Removal from register. For power of a conscientious objector to apply for the removal of his name from the register of conscientious objectors or for registration as a person liable for service in non-combatant duties, see s. 18, p. 60, *post*.

Conditional registration. For consequences of breach of a condition of registration as a conscientious objector, see s. 19, p. 60, *post*. For remuneration of persons con-

ducting medical examinations under sub-s. (6) (b) (i) and allowances to persons undergoing training under sub-s. (6) (b) (11), see s: 22 (3) (d), (c), respectively, p. 65, *post*.

If a period shorter than eighteen months is appointed under the proviso to s. 1 (2), p. 42, *ante*, as the term of whole-time service, the reference to "eighteen months" in sub-s. (6) (b) of this section is to be construed as a reference to that shorter period; see the National Service (Amendment) Act, 1948 (c. 6), s. 1 (3), p. 109, *post*.

Registration for non-combatant duties. It was held in *Eversfield v. Story*, [1942] 1 K.B. 437; [1942] 1 All E.R. 268; 2nd Digest Supp. that where a person registered for non-combatant duties persistently refused medical examination under enactments now replaced by s. 8, p. 49, *ante*, he ought to be punished and not dealt with by probation.

Until he attains the age of eighteen. For the construction of references to attaining a particular age, see s. 34 (3), p. 75, *post*.

Sub-s. (10).

Prescribed manner. For the form applicable for notification of change of particulars, see the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, reg. 16 (e) and Schedule, Part VIII.

* Summary conviction. For general provisions concerning offences, see s. 31, p. 71, *post*. For application of the Summary Jurisdiction Acts, see generally the Summary Jurisdiction Act, 1879 (c. 49), s. 51, title Magistrates, Vol. 14, p. 884.

18. Changes in register of conscientious objectors.—(1) A registered conscientious objector may at any time apply to the Minister in the prescribed manner either—

- (a) for the removal of his name from the register of conscientious objectors and for his registration in the military service register as a person liable or prospectively liable under this Part of this Act to be called up for service; or
- (b) for his registration in the register of conscientious objectors as a person liable or prospectively liable as aforesaid, but to be employed only in non-combatant duties.

(2) A person registered in the register of conscientious objectors as a person liable or prospectively liable under this Part of this Act to be called up for service but to be employed only in non-combatant duties, may, at any time before the day specified in an enlistment notice served upon him as the day on which he is thereby required to present himself, apply to the Minister in the prescribed manner for the removal of his name from that register and for his registration in the military service register as a person liable or prospectively liable under this Part of this Act to be called up for service.

(3) The Service Authorities shall make arrangements for enabling a person registered in the register of conscientious objectors as a person liable to be called up for service under this Part of this Act, but to be employed only in non-combatant duties, to apply to the Minister, at any time on or after the day mentioned in the last foregoing subsection, for the removal of his name from that register and for his registration in the military service register as a person liable to be called up for service under this Part of this Act; and where such an application is granted, the applicant may be employed in combatant duties.

(4) Where an application made under this section is granted, the Minister shall cause the register or registers to be amended accordingly.

NOTES

This section reproduces s. 7 of the National Service Act, 1941 (c. 15), as amended by the National Service Act, 1942 (c. 3), s. 1 (3) and Schedule.

Register of conscientious objectors. See s. 17 (1), p. 57, *ante*.

Prescribed. I.e., by regulations (s. 34 (1), p. 74, *post*). See the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, reg. 19 and Schedule, Part XIV, for form of application under this section.

Military service register. See s. 7 (4), p. 48, *ante*.

Liable to be called up. See s. 1 (1), p. 42, *ante*, as to liability to be called up.

Non-combatant duties. For provision for the registration of persons in the register of conscientious objectors as liable for service but to be employed only in non-combatant duties, see s. 17 (6), p. 58, *ante*. For duty of Service Authorities to secure that persons so registered are employed only in such duties, see sub-s. (9) of that section.

Enlistment notice. See s. 9, p. 51, *ante*, and as to service, s. 33, p. 74, *post*.

Definitions. For "registered conscientious objector", "Minister", "prescribed" and "Service Authorities", see s. 34 (1) p. 74, *post*.

Regulations under this section. National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683; see reg. 19. For general provisions concerning regulations, see s. 32, p. 73, *post*.

19. Breach of condition of registration as conscientious objector.—(1) Where it appears to the Minister that a conditionally registered conscientious objector has failed to comply with any condition on which he is registered, but had reasonable excuse for the failure, the Minister may refer his case to a local tribunal.

(2) Where it appears to the Minister that a conditionally registered conscientious objector has, at any time after the expiration of one month after the condition relating to his undertaking work has been imposed on him, failed to undertake the work specified by the tribunal or ceased to undertake it, the Minister may direct him to undertake any work so specified until the end of the period during which he is so registered or the direction is withdrawn.

(3) On any reference of the case of any person to a local tribunal under subsection (1) of this section, the tribunal, if it is satisfied that he has failed to comply with the condition but had reasonable excuse for the failure, shall report to the Minister accordingly and either—

- (a) make no order in the matter; or
- (b) order that the person whose case has been referred shall be registered without conditions in the register of conscientious objectors; or
- (c) order that the condition on which he was registered shall be varied, or that another condition shall be substituted therefor,

and any order made under paragraph (b) or (c) of this subsection shall have effect notwithstanding any previous order made by a local or appellate tribunal.

(4) Where the case of any person has been referred to a local tribunal under subsection (1) of this section—

(a) that person, if he is aggrieved by the order of the tribunal or by its failure to make an order or report to the Minister; or

(b) the Minister, if he considers it necessary;

may within the prescribed time and in the prescribed manner appeal to the appellate tribunal, and the decision of the appellate tribunal shall be final.

(5) If a person conditionally registered as a conscientious objector fails to comply with any condition on which he is registered or any direction given to him by the Minister under subsection (2) of this section, he shall, unless he satisfies the court that he had reasonable excuse for the failure, be guilty of an offence under this Part of this Act and liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine not exceeding one hundred pounds, or to both such imprisonment and such fine; or

(b) on summary conviction, to imprisonment for a term not exceeding twelve months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(6) A prosecution against any person under the last foregoing subsection for failing to comply with a condition or direction shall not be instituted except by or with the consent of the Minister; and where the case of any person has been referred to a local tribunal under subsection (1) of this section, the Minister shall not institute or consent to the institution of such a prosecution against him—

(a) unless that tribunal has determined the matter and made no report that he had reasonable excuse for the failure and the time for appealing from that determination has expired; or,

- (b) where an appeal has been brought from the determination of the local tribunal, unless the appellate tribunal has determined the matter and made no such report as aforesaid.

7. On the prosecution of any person for such an offence, a certificate purporting to be signed on behalf of the Minister and stating—

- (a) that he has not referred the case of that person to a local tribunal under subsection (i) of this section; or

- (b) that he has so referred the case and either—

- (i) that the local tribunal has determined the matter and made no such report as aforesaid and that the time for appealing from the determination has expired; or

- (ii) that an appeal has been brought from the determination of the local tribunal and that the appellate tribunal has determined the matter and made no such report; or

- (c) that he has directed a person to undertake any work and has not withdrawn that direction,

shall be conclusive evidence of the facts so stated. [134]

NOTES

This section reproduces s. 5 of the National Service Act, 1941 (c. 15), as amended by the National Service Act, 1947 (c. 31), s. 17 (1) and Third Schedule.

Regulations under this section. National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, reg. 18 (2) and Schedule, Part XI. For general provisions concerning regulations, see s. 32, p. 73, post.

Sub-s. (1).

Minister. *I.e.*, the Minister of Labour and National Service; see s. 34 (1), p. 74, *post*.

Conditionally registered conscientious objector. For definitions of "registered conscientious objector" and "conditionally registered", see s. 34 (1), p. 74, *post*, by which "conditionally registered", in relation to a conscientious objector, means a person for the time being conditionally registered in the register of conscientious objectors by virtue of an order made, or having effect under, s. 17 (6) (b), p. 58, *ante*, or made under sub-s. (3) (c) of this section, s. 20 (2), p. 63, *post*, or s. 21 (4), p. 64, *post*.

On a prosecution for an offence under this Part of this Act, the fact that the defendant is or was a conscientious objector registered on a particular condition may be evidenced by a certificate purporting to be signed on behalf of the Minister of Labour and National Service; see s. 31 (6) (a), p. 72, *post*.

Reasonable excuse. See note to sub-s. (5), *infra*.

Local tribunal. By s. 34 (1), p. 74, *post*, this means a local tribunal constituted under the Fourth Schedule, p. 106, *post*; see also s. 22, p. 64, *post*, for general provisions concerning tribunals.

Sub-s. (2).

Directions to undertake work. Power to direct conditionally registered conscientious objectors to undertake work specified by a local tribunal was formerly exercised under reg. 58A of the Defence (General) Regulations, 1939, S.R. & O. 1939 No. 927, as amended (which confers general power to control employment and is temporarily continued in effect by S.R. & O. 1945 No. 1620 made under the Supplies and Services (Transitional Powers) Act, 1945 (c. 10), title War and Emergency, Vol. 26). Sub-s. (2) of the present section corresponds to

sub-s. (1a) inserted in s. 5 (repealed) of the National Service Act, 1941 (c. 15), by the National Service Act, 1947 (c. 31), s. 17 (1) and Third Schedule.

Sub-s. (3).

Register of conscientious objectors. See s. 17 (1), p. 57, *ante*.

Without conditions etc. Cf. s. 17 (6), p. 58, *ante*.

Appellate tribunal. By s. 34 (1), p. 74, *post*, this means the appellate tribunal constituted under the Fourth Schedule, p. 106, *post*; see also s. 22, p. 64, *post*.

Sub-s. (4).

Prescribed time; prescribed manner. *I.e.*, "prescribed" by regulations (s. 34 (1), p. 74, *post*). See the National Service (Miscellaneous) Regulations, 1948, S.I. 1948 No. 2683, reg. 18 (2) and Schedule, Part XI.

Sub-s. (5).

Offences. For general provisions concerning offences, see s. 31, p. 71, *post*.

Reasonable excuse. This means reasonable excuse for disobedience as a conscientious objector; on failure of a conscientious objector to comply with a condition or direction, the court cannot inquire whether the person brought before it was ever liable to be registered under this Act at all (*Emery v. Sage*, [1943] 1 All E.R. 509; 2nd Digest Supp.). Cf. also, for the meaning of "reasonable excuse", the Territorial and Reserve Forces Act, 1907 (c. 9), s. 20 (1), *post* (Part 3), where the expression "sickness or other reasonable excuse" is employed, and the cases cited in 4 Words and Phrases 486 *et seq.*

Summary conviction. For the general application of the Summary Jurisdiction Acts, see the Summary Juris-

diction Act, 1879 (c. 49), s. 51, title Magistrates, Vol. 14, p. 884.

Sub-s. (7).

Evidence by certificate. Cf. s. 31 (6) (a), p. 72, *post*, by which the fact that the defendant is or was a conditionally registered conscientious objector may be evidenced by certificate.

20. Provision as to certain persons sentenced for failure to attend medical examination.—

* * *

(4) Where the appellate tribunal recommend under this section that a person be discharged from whole-time service, the tribunal shall have power to make any order with respect to his registration as a conscientious objector which they would have had power to make on an appeal under section seventeen of this Act, and any such order shall have effect immediately upon his discharge.

APPENDIX C

Only the Uniting Conference and subsequent General Conferences may speak with authority for United Methodism. Passed by the 1968 Uniting Conference, these resolutions serve to guide the thought and action of United Methodists for the years of work and service that lie ahead.

THE UNITED METHODIST CHURCH AND PEACE

The Christian Church must stand for the principle of unconditional love as manifested in the life and service of its Lord. The power of such love to transform persons, groups, and relationships is a testimony to the practical realism of the Christian gospel.

Christians and the Church must seek to express God's love through the incorporation of universal values in the policies of nations and the programs of international organizations.

We call attention to the unique opportunities of the church as an instrument of peace, and to the special responsibilities which these opportunities imply.

a. The church can be objective, since it represents no particular nation, social class, economic theory, or political party.

b. The church can be a means of communication, since it includes people of many nations and groups.

c. The church can be a means of reconciliation and unity, since it holds forth a supreme loyalty greater than the lesser causes for which men fight.

d. The church has, in the proclamations of the prophets, the standards of social righteousness without which peace is not secure.

e. The church has, in the witness of Christ, the key to achieving needed change without violence.

f. The church can hear and share the Spirit of the Eternal, in which contemporary passions may be seen in true perspective.

1. Sovereignty

We remind the people and the leaders of all countries that no nation is ultimately sovereign. All nations and people are under the judgment of God. Scripture reminds us that in the eyes of God the welfare of the human race is more precious than the continued existence of any nation.

* * *

7. The Individual and Military Training and Service

a. We affirm the opposition of The Methodist Church to compulsory military training and service in peacetime. Efforts should be made to include the universal abolition of military conscription in any disarmament agreement the nations may reach so that all men and nations may be free from its harmful influence.

b. Regarding the duty of the individual Christian, opinions sincerely differ. Faced by the dilemma of participation in military service he must decide prayerfully before God what is to be his course of action in relation thereto. What the Christian citizen may not do is to obey men rather than God, or overlook the degree of compromise in our best acts, or gloss over the sinfulness of war. The church must hold within its fellowship persons who sincerely differ at this point of critical decision, call all to repentance, mediate to all God's mercy, minister to all in Christ's name.

We believe it is our obligation to render every assistance to the individual who conscientiously objects to service in the military forces. He should receive counsel concerning his rights in this respect, assistance in bringing his claim before the proper authorities, and support in securing recognition thereof.

Thousands of our sons and daughters have, with sincere Christian conscience, responded to the call for service in the military forces. We are obligated to provide pre-induction counseling and educational material prepared by the appropriate agencies of the church. We believe particular emphasis should be directed to the serviceman's bearing a good witness for Christ, the church and the nation.

c. **Christians cannot complacently accept rights or privileges accorded to them because of their religious views but denied to others equally sincere who do not meet a religious test. So long as military conscription legislation remains in effect, we believe that all those who conscientiously object to participation in all wars should be granted recognition and assigned to appropriate civilian service, regardless of whether they profess religious grounds as the basis of their stand.**

[Bold Type Supplied]

8. **World Trade and Economic Development.**

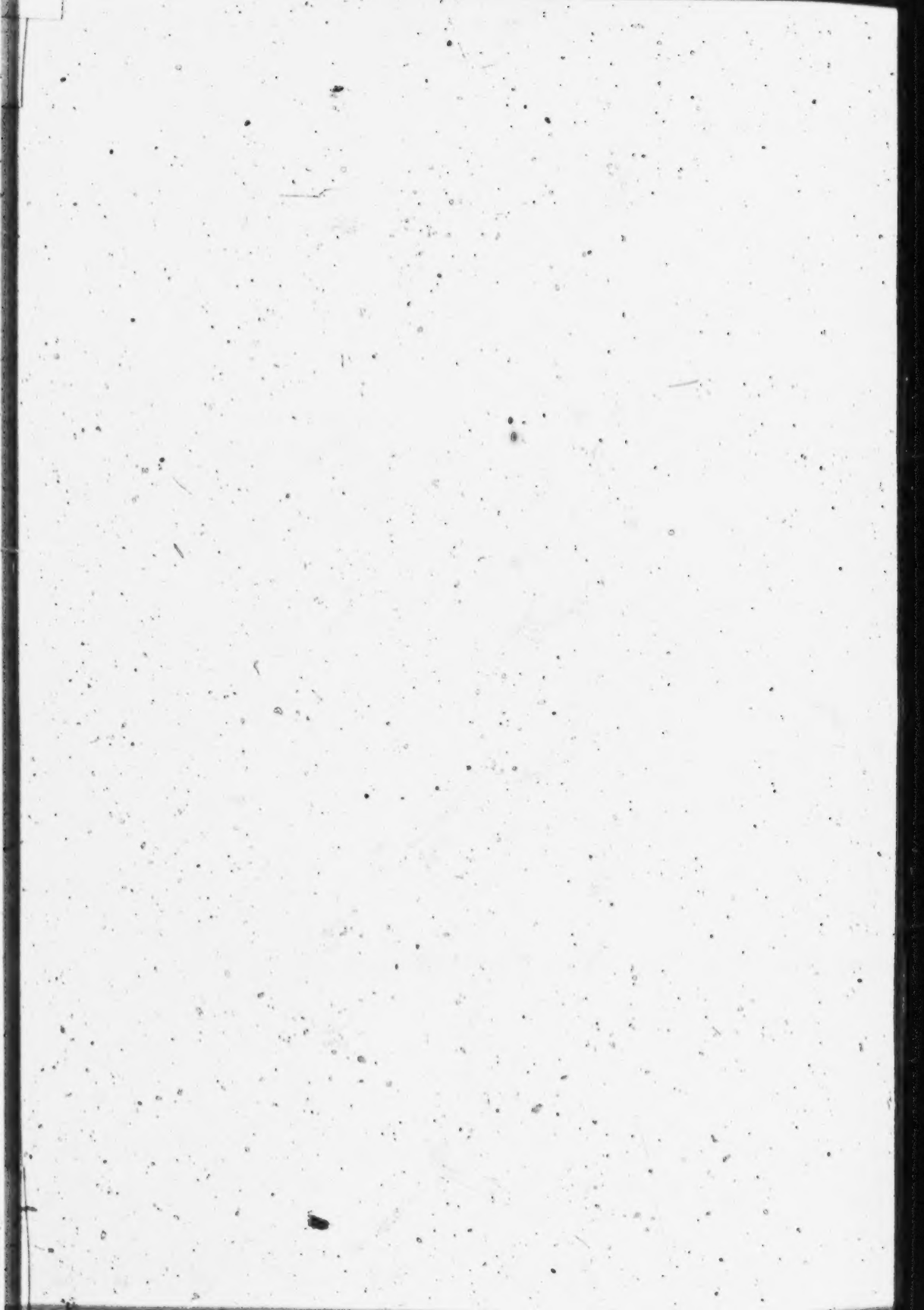
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 76

ELLIOT ASHTON WELSH, II, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 55-81) is reported at 404 F.2d 1078.

JURISDICTION

The judgment of the court of appeals (A. 82) was entered on September 23, 1968. A petition for rehearing was denied on January 31, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 1, 1969, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTIONS PRESENTED

1. Whether petitioner's conscientious objection to war in any form stemmed from religious beliefs.

2. Whether the Selective Service laws may constitutionally be applied to require induction into the Armed Forces of a registrant who declares his opposition to military service on nonreligious grounds.

3. Whether a registrant who refuses to reexecute an Armed Forces Security Questionnaire at the induction station can properly be charged with refusing to submit to induction.

STATEMENT

After a jury-waived trial in the United States District court for the Central District of California, petitioner was found guilty of refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a). On June 1, 1966, he was sentenced to imprisonment for three years. On appeal, the conviction was affirmed (A. 55-69), one judge dissenting (A. 69-81).

The evidence showed that on February 2, 1960, petitioner registered with Local Board No. 95, in Los Angeles County, California (SSF 1).¹ In December 1961, he was classified 1-A, a classification he acknowledged when he applied for and received permission to depart from the United States for a one-year period. On March 27, 1964, he was ordered to report for a physical examination (SSF 8). In April 1964, he requested exemption from combatant training and service on the

¹ "SSF" refers to petitioner's Selective Service File which was introduced into evidence at trial as Government Exhibit 1.

special form for conscientious objectors (SSS Form 150), stating that because of his beliefs "he was conscientiously opposed to war in any form," but striking out the language on the form relating to "religious training" (SSF 17). He also indicated that he did not believe in a Supreme Being (*ibid.*). On May 12, 1964, the local board granted the requested exemption and classified petitioner I-A-Θ (SSF 11, 16-17).²

On May 25, 1964, petitioner wrote a letter stating that he wished to appeal the classification and asking for a personal appearance before the local board. For the first time he expressed opposition not only to combatant service but to non-combatant service as well, saying that any participation in the Armed Forces would implicitly condone and contribute to the mission of the military (A. 13). After his appearance, the local board advised him that since he had appealed his classification, the appeal board would determine whether he qualified for a non-combatant, I-O classification (A. 14). He thereafter again appealed his classification (A. 15). In July 1964, the appeal board tentatively determined that petitioner should not be classified I-O or in a lower class (A. 18).

On June 22, 1965, petitioner wrote his local board, stating that it had come to his attention that "Supreme Being" might have a broader interpretation than the one he had given it in completing the form 150. In explaining his views and relating them to his conscience, petitioner stated that "in our failure to

² On May 8, 1964, petitioner was found fully acceptable for induction into the Armed Forces.

recognize the political, social, and economic realities of the world, we as a nation, fail our responsibility as a nation" (A. 30).

In July 1965, petitioner personally appeared before a Department of Justice hearing officer who found that there was "no religious basis" for petitioner's conscientious objector claim. The hearing officer concluded, therefore, that petitioner's objection to military service did not come within the statutory exemption. In August 1965, the Department of Justice accepted this recommendation and so advised the appeal board (App. 19-24).⁵ Subsequently, on October 13, 1965, petitioner wrote to the appeal board, asking to "comment upon and correct" certain statements in the Department of Justice recommendation (A. 38).

On November 15, 1965, petitioner was classified I-A by the appeal board and his file was returned to the local board (SSF 68). One week later, he was ordered to report for induction. On November 30, 1965, his employer requested a postponement of his induction, stating that petitioner's specific assignment as a mathematician and scientific computer programmer "involves the entire responsibility for the scientific programming of a computer which is utilized as a turbojet engine analyser for several military aircraft which are being utilized in Viet-Nam at this time" (A. 46). After this request was denied, petitioner

⁵This hearing took place subsequent to this Court's decision in *United States v. Seeger*, 380 U.S. 163. In fact, the Department's recommendation made specific reference to the *Seeger* opinion.

reported to the induction center on December 8, 1965, but refused to step forward for induction. The instant prosecution ensued.

On appeal the court below noted that petitioner "constantly declared that his beliefs stemmed from sociological, economic, historical and philosophical considerations," and "denied that his objection to war was premised on religious belief" (A. 59). It thus rejected his contention that the appeal board's denial of I-O and I-A-O classifications was without any basis in fact. Moreover, the court concluded that all of petitioner's procedural rights had been accorded him. It found that petitioner's refusal to reexecute an Armed Forces Security Questionnaire at the induction station provided no basis for vitiating his conviction, resulting at most in a non-prejudicial procedural irregularity. In a footnote at the end of its opinion, the court referred to the fact that the dissenting opinion,⁴

⁴ The dissenting opinion found error in the appeal board's accepting without apparent question the Department of Justice hearing officer's conclusion that there was "no religious basis for the registrant's conscientious objector claim" (A. 69). After reviewing the evidence presented to the appeal board, the dissenting judge concluded that there was no basis in fact for its determination that petitioner's objection to military service was not of a religious nature in the statutory sense, in view of this Court's broad reading of Section 6(j) in the *Seeger* case (A. 74-81). Petitioner's "disclaimer of a religious motivation [for his asserted objection] was predicated upon a misunderstanding of the statutory meaning of the term, as construed in *Seeger*," the dissent suggested (A. 79). His claim for conscientious objector status was thus improperly rejected, the dissent concluded, and his conviction should be reversed (A. 81).

"while based on other grounds, mentions the possible unconstitutionality of the 'religious training and belief' provision of section 6(j) of the Act" (A. 69). As to this issue, the court simply stated that "since it was not listed as one of the questions presented in [petitioner's] opening brief or argued there it does not require comment in the majority opinion" (*ibid.*). It went on to state, however, that a collateral proceeding asserting this point "would find no support in this record and would be met by prior holdings of this court sustaining the religious exemption against Establishment Clause attack," citing various Ninth Circuit decisions as to which this Court denied certiorari (*ibid.*). Accordingly, the court below affirmed petitioner's conviction.

SUMMARY OF ARGUMENT

Section 6(j) of the Universal Military Training and Service Act, as enacted in 1948, provided an exemption from combatant training and service for persons who by reason of religious training and belief are opposed to participation in war in any form. The Act defined "religious training and belief" as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation", but expressly provided that the phrase "does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In *United States v. Seeger*, 380 U.S. 163, this Court broadly construed the "Supreme Being" clause to avoid imparting to Congress an intent to pick and choose among religions. However, unlike the petitioners in *Seeger*, the petitioner in the instant case has constantly professed that his beliefs stemmed from sociological, economic and historical considerations rather than from religious belief. Under the circumstances, not only does the record show an ample basis in fact for the administrative determination that petitioner's beliefs were not religiously founded, but the record is devoid of evidence that would support the conclusion that his beliefs were essentially religious.

Assuming the Court agrees with our position that petitioner is a non-religious objector, the questions left for consideration are: (1) whether the granting of exemption to religious objectors but not to those whose beliefs are essentially based on the other considerations enumerated in the statute, amounts to an "establishment of religion" in contravention of the First Amendment or (2) whether the distinction amounts to an improper discrimination in violation of the Fifth Amendment.

Our basic position is that to accommodate religion is not to prefer it. The exemption for religious objectors is not an attempt to foster or encourage religion. Congress recognizes that to force certain persons to

fight would force them to violate the cardinal tenets of their religion and has sought to alleviate that hardship. To do so is to give a proper deference to the Free Exercise Clause, not to establish religion.

Moreover, Congress did not act arbitrarily or invidiously in distinguishing between religious objectors and those whose beliefs are not religious, but essentially political, sociological, philosophical or based on a purely personal moral code. An individual who disavows all religious belief (however broadly "religious" be defined) but who surveys the contemporary human scene and decides on the basis of political, sociological, and economic considerations that a particular war is wrong or that all wars are wrong is making a judgment in the field of human relations; he is essentially basing his judgment on the same considerations the government must consider in making its determination as to whether or not we should engage in war. This qualitative difference between religious and non-religious objectors is one which Congress could validly recognize when passing legislation to implement its power to raise and support armies.

ARGUMENT

I. PETITIONER'S BELIEFS DO NOT QUALIFY AS RELIGIOUS WITHIN THE MEANING OF *United States v. Seeger*, 380 U.S. 163

Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), as it read at the time petitioner first sought conscientious objector status in 1964, exempted from combatant service and training any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." It defined "religious training and belief" as:

belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.⁵

Such persons remain subject to the draft but are assigned to non-combatant service, or, if their religious beliefs require, to forms of civilian service outside the Armed Forces.

In *United States v. Seeger*, 380 U.S. 163, this Court concluded "that Congress, in using the expression 'Supreme Being' rather than the designation 'God' was merely clarifying the meaning of religious train-

⁵ An amendment to the Act in 1967, subsequent to this Court's decision in the *Seeger* case, deleted any reference to a "Supreme Being" in Section 6(j). While the new provision does not purport to define "religious training and belief," it does continue to provide that the term "does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

ing and belief so as to embrace *all* religions" (*id.* at 165; emphasis added). Noting the "vast panoply of beliefs" prevalent in our country, the Court construed congressional intent as in "keeping with its long-established policy of not picking and choosing among religious beliefs" (*id.* at 175). To qualify as religious under the Court's construction, the person seeking exemption must possess either a religiously grounded belief or "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" (*id.* at 176).

Finding that all three registrants in the cases before it qualified for the statutory exemption, as so interpreted, the Court deemed it unnecessary to decide whether Congress could constitutionally exempt persons whose beliefs stemmed from religious convictions while denying conscientious objector status to those whose objection to war—however strong and sincere—was grounded on a personal, philosophical or moral basis.

Petitioner, although he does not raise the issue as a question presented, suggests that, as the dissenting judge below thought (see A. 74-81), he also qualifies as a religious objector under the *Seeger* test. That question is a threshold one that must be resolved before this Court reaches the constitutional issues petitioner presents.

In our view the record shows that petitioner's beliefs are not based on religious training and belief even under the most expansive and generous reading

of Section 6(j), as authoritatively construed in *Seeger*. On his original application for conscientious objector classification, petitioner struck the words "my religious training and" from the statement as to the source of his conscientious objection (SSF 17). He further declared that he did not believe in a "Supreme Being" (*ibid.*). Accordingly, the application read that petitioner was "by reason of * * * belief, conscientiously opposed to war in any form." Subsequently, petitioner sent his local board a letter in which he amended his original claim for conscientious objector classification. He stated that it had come to his attention "that the term 'Supreme Being' may have a broader meaning than the one I had given it" (A. 29). Although he professed that he did "not believe in God—in the everyday sense," he indicated a desire to have the answer to the question, "Do you believe in a Supreme Being?", left open, at least for the time being (*ibid.*).

In presenting the reasons which provided the basis of his conscientious objector claim, petitioner stated his belief that each of us possesses "some sort of ethical apparatus, a conscience, if you will" (A. 30), and quoted with approval statements from a variety of sources which presumably explicated his views further. However, in his own words he stated (A. 33):

Were I not granted relief under [the Act] I would be required to enter the service of the Government of the United States, which service involves not only the performance of duties which are onerous, but worse, the implied profession of commitment to the military ethic. I

would not so much mind the cleaning of latrines per se; what I *would* object to is the fact that I am cleaning latrines in support of an institution which has become, quite simply, less than useful to the conduct of human affairs. I am afraid reason has already subverted my commitment to the military ethic.

Petitioner also referred to and criticized Lieutenant General Sir John Winthrop Hackett's statement in *The Profession of Arms* that "[t]he function of the profession of arms is the ordered application of force to the resolution of a social problem" (A. 33). Petitioner remarked:

Doesn't he mean "elimination of the social problem"? If those who are causing a "social problem" are prevented from acting by means of force, the social problem is not resolved, really, it is either suspended or eliminated.

Petitioner concluded (A. 30-31):

I have not been specific about my refusal to participate in the military *vis-à-vis* conscience. I do not believe it is possible to be. I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*. * * * It is suggested that those who implement policy are fully aware of these facts, but that they must be realistic. "When confronted by armed agres-

sion," they ask, "how else can we respond?" My questions: What measures could we have taken to alleviate the "social problem" peacefully? To what degree are we economically and socially committed to "look for" aggression? To what extent do we thus *depend* on it?

In accordance with procedures in effect at that time, after a tentative determination by the appeal board that petitioner should not be classified I-0 or in a lower class, petitioner's file was forwarded to the Department of Justice for the purpose of securing an advisory recommendation.* The Department's report noted that petitioner stated that he did not believe in God or a Supreme Being, but rather that he believed in the "natural law" (A. 21). As to natural law, the hearing officer reported that petitioner recognized that, just as there are certain physical laws in nature, such as gravity and electrical impulses, there are laws affecting the relationship of human beings such as the feeling of gregariousness; that ethics are implicit within us governing the conduct of individuals; that he refused to relate human conduct to questions of guilt, punishment or reward; and that he does not believe in a life after death or in a life of what might be called a human soul (*ibid.*). The hearing officer reported that petitioner stated that his primary objection to military service is that soldiers are involved in taking human lives and that life should not be voluntarily taken, but that he did not see it as a moral or religious wrong but merely as a

* This procedure was subsequently eliminated by the 1967 amendment to the Act.

"social error" or illogical action (*ibid.*).¹ The hearing officer reported that while petitioner conceded the possibility that some of his early religious training may have had some influence on his thinking, he stressed "that his belief is that his opinions have been formed by reading in the fields of history and sociology, and that they are purely 'rational' as opposed to 'religious'" (A. 22).

On the basis of petitioner's own statements, the Department of Justice and the appeal board were amply justified in concluding that petitioner was not, and did not claim to be, a *religious* conscientious objector. We recognize that *Seeger* held that the lack of formal religious training does not preclude an applicant from qualifying for conscientious objector status under Section 6(j). But in *Seeger* this Court noted that "at no time did any one of the applicants suggest that his objection was based on a 'merely personal moral code'" (380 U.S. at 186), and that "at the outset each of them claimed in his application that his objection was based on a religious belief" (*ibid.*). In the instant case, on the other hand,

¹ Petitioner later wrote a letter to the appeal board "to comment upon and correct several statements" in the Department's report (A. 38). He stated that while "I mentioned taking of life as not being, for me, a religious wrong. * * * I assumed [the hearing officer] was using the term 'religious' in the conventional sense" and that he did believe the taking of life to be morally wrong (A. 44). Petitioner also sought to correct, *inter alia*, the hearing officer's statement that "the registrant stated that there should be no armies, even for defense or resistance to aggression" (A. 21), by asserting that the statement should read that "there should be no armies because they do not constitute a vital defense, nor do they provide a permanent means of resisting aggression" (A. 43).

petitioner did not claim that his beliefs were religious in origin. Rather, as noted above, he characterized his beliefs as having been formed "by reading in the fields of history and sociology" (A. 22).^{*} In fact, the record is devoid of evidence which would reveal that petitioner's beliefs are based on other than essentially political, sociological or philosophical views or a merely personal moral code.

When an individual claims to be religious, his own characterization of his beliefs in this respect must be accorded great weight (*Seeger, supra*, 380 U.S. at 184; see also *United States v. Ballard*, 322 U.S. 78). Similarly, his own statement that his beliefs are not religious is not to be lightly disregarded. As the court of appeals observed and the record discloses, petitioner "constantly declared that his beliefs stemmed from sociological, economic, historical, and philosophic considerations," and "denied that his objection to war was premised on religious belief" (A. 59). Taking into account the responsibility of the Selective Service authorities in assaying the facts and the limited scope of judicial review in this area, we believe that there was ample basis in fact for the administrative determination that petitioner's beliefs were not religiously founded. See, e.g., *Estep v. United States*, 327 U.S. 114. The record is not only empty of evidence that could lead to the conclusion that his beliefs could be construed as essentially religious, it affirmatively shows that they were of a non-religious

^{*} In his subsequent letter to the appeal board (discussed in note 7, *supra*), petitioner did not deny this to be a correct statement of the source of his beliefs.

character, even under the broad meaning given that concept in the *Seeger* case. To extend the definition of religion further to include the beliefs of persons like petitioner would be to vitiate entirely that portion of the statute which specifically provides that "religious training and belief * * * does not include essentially political, sociological, or philosophical views, or a merely personal moral code," and thus reach a result plainly contrary to the manifested congressional intent.

II. CONGRESS MAY CONSTITUTIONALLY ACCOMMODATE THE FREE EXERCISE OF RELIGION WITH THE NEEDS OF NATIONAL DEFENSE BY ASSIGNING TO NON-COMBATANT SERVICE OR CIVILIAN WORK OUTSIDE THE ARMED FORCES REGISTRANTS WHO BY REASON OF RELIGIOUS BELIEF ARE OPPOSED TO PARTICIPATION IN WAR IN ANY FORM

In judging the constitutionality of the classification which Congress established by Section 6(j), it is essential to keep in full perspective the legislative problem of defining any exemption for conscientious objectors. The question here is not whether concern for the rights of the individual citizen, as opposed to society generally, should lead to a policy of exempting all persons who can be said to have conscientious scruples against military service, or whether a personal moral code is as "good" or as "worthy of respect" as religious convictions. The framing of a conscription law involves legislative judgments of no little difficulty, which the courts may not supersede unless the legislature clearly exceeds its proper function. The fact that other lawmaking bodies in certain other countries have determined to allow exemptions to conscientious objectors whether or not their beliefs

stem from religion (Pet. Br. 15-16) is hardly controlling in this regard. The question here is whether Congress constitutionally had the authority to make the choice it did to exempt only those whose conscientious objection stemmed from religious belief. This in turn resolves itself into two questions—whether the congressional determination on this matter constitutes the “establishment” of religion in violation of the First Amendment and whether it amounts to invidious discrimination under the Fifth Amendment.

The historical evolution of the conscientious objector provision was traced in detail in the government's brief in the *Seeger* case (No. 50, 1964 Term, pp. 41-69), and we do not repeat it here.⁹ It shows however, that Congress has considered more than once, with full floor debate and committee testimony, what special treatment, if any, should be accorded persons otherwise eligible for the draft who oppose participation in war in any form. The legislative approach to this troublesome subject has been remarkably consistent. The exemption, with few exceptions, has been confined throughout to persons who belonged to religious sects opposed to war or to those whose individual religious beliefs provided the basis for that conviction. From the day James Madison suggested that “no person religiously scrupulous shall be compelled to bear arms” (1 *Annals of Congress* 749) through the enactment of amended Section 6(j), there was general agreement that such an accommodation of religious freedom with the needs of national defense neither created an un-

⁹ The Argument portion of the *Seeger* brief has been reprinted and, for the convenience of the Court, is submitted as a Supplement to this brief.

constitutional discrimination nor violated the principle of separation between Church and State. While long existence cannot validate an unconstitutional practice, the fact that Section 6(j), as presently written, reflects a tradition that dates back to the early days of our republic, and even to colonial times, goes far to demonstrate the reasonableness of the legislative classification and its consistency with the Constitution.

1. In granting exemption only to religious conscientious objectors, Congress is accommodating, rather than establishing, religion.

The separation of church and state mandated by the Establishment Clause of the First Amendment does not, we submit, require government to ignore religious beliefs in framing legislation dealing, in a secular context, with matters where the result would otherwise be, at least in some instances, to force a person to violate the cardinal tenets of his religion. The aim of the exemption is to alleviate the hardship that would result if individuals were compelled to flout the commands of their religion in order to obey those of the State—or subject themselves to criminal prosecution for adhering to their religious beliefs.

To impose an obligation to participate in combatant training and service upon a person whose religious convictions forbid him to participate in war in any form interferes in a substantial sense with religious liberty. Congress has sought to reduce this interference rather than ask a registrant to violate the principles of his religion—whatever form that reli-

gion may take. Section 6(j) attempts to accommodate the principle of equality of patriotic obligation with religious liberty by assigning the religious objector to non-combatant service or, if that too be inconsistent with his religious scruples, by assigning him to civilian work in the national interest in lieu of military service. In so doing Congress does not interfere with, much less prohibit, the full freedom of non-religious objectors to refuse to believe in or practice religion. It has merely determined that they, like millions of others, do not receive an exemption available to religious objectors.

The question narrows, therefore, to whether Congress, by allowing an exemption for religious objectors, grants a preference for religion in violation of the purposes of the First Amendment. Cf. *Everson v. Board of Education*, 330 U.S. 1, 15-16. Our basic position is that accommodation of religion is not a preference for religion. For the State to avoid an intrusion upon freedom of religion is an effort to remain neutral—to avoid hostility to religion rather than to prefer it. The exemption granted to religious objectors is an attempt by Congress to accept or acquiesce in, to recognize, to accommodate rather than to establish, foster, or encourage religion.¹⁰

¹⁰ In arguing, as we do, that Congress may properly seek to avoid such interference, we intend no implication that Congress is constitutionally required to grant any exemption at all. This Court has stated the contrary. See *United States v. Macintosh*, 283 U.S. 605, 623-624 (*dictum*), overruled on other grounds, *Girouard v. United States*, 328 U.S. 61. See also *Hamilton v. Regents*, 298 U.S. 245, 265-268 (Cardozo, J., concurring); our brief in *United States v. Sisson*, No. 305, this Term (pp. 42-49).

The power of Congress to make such an accommodation has been sustained on several occasions in prior decisions of this Court. In the *Selective Draft Law Cases*, 245 U.S. 366, the Court upheld the Selective Draft Law of 1917, which included an exemption for persons who were members of religious sects opposed to war in any form, so long as their own religious convictions were the same as those of the sect to which they belonged. In this regard, the Court stated (*id.* at 389-390):

[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act * * * because we think its unsoundness is too apparent to require us to do more.

Similarly, in *Ruthenberg v. United States*, 245 U.S. 480, decided shortly thereafter, the Court merely cited the *Selective Draft Law Cases* in holding the exemption constitutional as against the claims that it violated freedom of religion to allow an exemption to objectors who opposed war and belonged to a sect which opposed all war, but not to religious objectors who did not belong to such a sect, and, alternatively, to give an exception to objectors who based their position on religious conviction, but not to those whose views came from within themselves.¹¹ The issue in these early cases was presented in a more difficult context than here since the World War I statute re-

¹¹ See Brief for Petitioner, No. 656, 1917 Term, pp. 1-9.

stricted the exemption to members of religious sects and made no provision for the unaffiliated believer. In the subsequent amendments to the Act, as construed in *Seeger*, there is no longer the problem that would arise were the exemption intended to pick and choose among various religions (*Seeger, supra*, 380 U.S. at 175-176).

While the Court has not since had to deal with the constitutional issue with respect to the conscientious objector exemption, its more recent decisions in the First Amendment area recognize that it is permissible for Congress to make accommodations in order to minimize conflict between religious belief and governmental regulation.

In *Everson v. Board of Education*, 330 U.S. 1, where the Court upheld the propriety of the payment of bus fares to children attending parochial as well as public school, it said (*id.* at 18):

Of course, cutting off church schools from [various municipal services such as police and fire protection], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Subsequently, in *Zorach v. Clauson*, 343 U.S. 306, the Court sustained a public school program releasing children to attend religious instruction in their own

places of worship.¹² There the Court said (*id.* at 313-314):

We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. * * * When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. * * * The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. * * *

The Court nowhere suggested that non-religious parents also must be permitted to have their children released for an equivalent period; indeed, the released-time program before the Court clearly did not allow for this. See 343 U.S. at 308-309, n. 1. Thus, the Court upheld an accommodation of religion even though no equivalent exemption from attendance was extended to non-religious persons.

In the Sunday Closing Law cases (*McGowan v. Maryland*, 366 U.S. 420; *Two Guys From Harrison-*

¹² Compare, however, *McCullum v. Board of Education*, 333 U.S. 203, holding a program of religious instruction conducted within the public schools unconstitutional.

Allentown, Inc. v. McGinley, 366 U.S. 582; *Braunfeld v. Brown*, 366 U.S. 599; and *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617), this Court upheld the statutes involved on the ground that they had a secular, not a religious, purpose. However, none of the opinions in those cases suggested that, if an exemption were granted to Sabbatarians, such as Orthodox Jews—as 21 of the 34 States which had Sunday closing laws in fact did (see 366 U.S. at 614, n. 1)—it would be unconstitutional under the Establishment Clause. Quite the contrary, the Court in *Braunfeld* indicated that “this may well be the wise solution to the problem” (366 U.S. at 608).¹³

Finally in *Sherbert v. Verner*, 374 U.S. 398, this Court held that a State may not deny unemployment compensation benefits to persons who will not work on Saturdays because of their religious beliefs, where the individual involved had refused employment which required such work. This holding was based on the Free Exercise clause of the First Amendment and therefore did not apply to persons of religious faiths who were not forbidden to work on Saturdays or to the non-religious. The Court explicitly rejected the argument that this holding itself constituted an establishment of religion on the ground that it “reflects

¹³ Mr. Justice Brennan, in his concurring and dissenting opinion in *Braunfeld*, concluded that the Free Exercise Clause prevented Orthodox Jews from being required to close their businesses on Sunday since their religion prescribed that they be closed on Saturday and closing for two days each week would cause them serious economic injury. In so doing he rejected the claim that such an exemption from the Sunday laws for persons of certain religious sects would constitute an establishment of those religions (366 U.S. at 615).

nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409). Mr. Justice Stewart, concurring in the result, agreed that the State was required by the Free Exercise Clause to treat a person differently when his refusal to work is based on religious convictions than when it is grounded on other reasons and that this did not violate the Establishment Clause (374 U.S. at 413-417). Mr. Justice Harlan, joined by Mr. Justice White, dissented on the ground that the Free Exercise Clause did not require the State to make an exception for persons who refused to work because of religious conviction. His opinion went on, however, to say (374 U.S. at 422-423):

[I]t would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" * * * is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. * * * [T]here is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

Thus, the Court was unanimously of the view that, whether or not in a particular situation government is constitutionally required to do so, it *may* give an exemption limited to persons holding religious beliefs in order to avoid interference with their freedom of religion, as fully protected by the First Amendment. Cf. also *Murdock v. Pennsylvania*, 319 U.S. 105.

This line of cases recognizing the constitutional permissibility of accommodating religious belief and governmental regulation is readily distinguishable from *Torcaso v. Watkins*, 367 U.S. 488. In *Torcaso*, the State requirement of a religious oath as a prerequisite to holding public office was struck down as inconsistent with the Free Exercise Clause. There the State-required oath, which exacted affirmation of a belief in God, did not purport to be—nor could it reasonably be argued to be—designed to accommodate religion. Nor was it a proper area in which religion should be allowed to operate. It is a far different situation where the State seeks to accommodate one whose religion mandates that he not participate in war. For the State not to recognize, respect, and accommodate this person's convictions would, whether justifiable or not, interfere significantly with his freedom to follow his religious beliefs. It would put the government in a position of hostility, rather than simply of neutrality, toward religion.

Nor do this Court's more recent decisions in Establishment Clause cases militate against the accommodation here suggested. In *Engel v. Vitale*, 370 U.S. 421, the Court concluded that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no

part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government" (*id.* at 425). Granting exemption to religious objectors to participation in war in no respect constitutes the kind of governmental "religious program" which the Court in *Engel* found unconstitutional. Similarly, in *Abington School District v. Schempp*, 374 U.S. 203, where the Court struck down Bible reading and saying of the Lord's Prayer as religious exercises in public schools, the standard enunciated is wholly compatible with legislative recognition of religiously grounded objection to military service. A recurrent theme throughout the *Schempp* opinion, which includes as thorough a doctrinal discussion of the First Amendment as any of the Court's recent cases, is the necessary and unavoidable interplay between the Free Exercise and Establishment Clauses. And the term most frequently used in that opinion, in describing the proper relationship between church and state, religion and government, is "neutrality". If government oversteps the bounds in favoring religion, it violates the Establishment Clause; but just as surely if it disfavors religion it runs afoul of the Free Exercise Clause. What is called for by *Schempp* is a reasonable accommodation along the lines here suggested.¹⁴ The critical test is there stated

¹⁴ As Mr. Justice Brennan stated in his concurring opinion in *Schempp*, 374 U.S. at 295, "[N]othing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers

in the following language: "[W]hat are the *purpose* and the *primary effect* of the enactment?" (374 U.S. at 222; emphasis added). Applying this standard to Section 6(j), it seems clear that the purpose, as well as the primary effect, of allowing exemption to religious objectors is not to advance or foster religion, but instead simply to avoid inhibiting religion. The purpose is thus a secular one, within the meaning of the Court's opinion in *Schempp*, and the result achieved is neither favoritism nor restraint, but rather neutrality (see *ibid.*). Indeed, as the extensive discussion in Mr. Justice Brennan's concurring opinion in *Schempp* indicates, such an approach of reasonable accommodation is the sole way to work out the potentially self-defeating clash which might appear to exist between the Free Exercise and Establishment Clauses (see *id.* at 230-304). As specifically pointed out in that opinion, while government may not be required by the First Amendment to exempt religious conscientious objectors from military service, "hostility, not neutrality, would characterize * * * the withholding of draft exemptions for ministers and conscientious objectors" (*id.* at 299).

Finally, the Court's decision in *Board of Education v. Allen*, 392 U.S. 236, which upheld the validity of New York's program of lending textbooks free of charge to children in parochial as well as public would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose." See also Mr. Justice Goldberg's concurring opinion in *Schempp* (374 U.S. at 306).

schools, confirms the view that an establishment of religion in the constitutional sense does not occur simply because government takes religion into account in developing a particular program. Analogizing the situation there presented to that in *Everson*, the Court concluded that application of the test enunciated in *Schempp* did not require invalidation of the program as violative of the Establishment Clause (see *id.* at 243). See also *Pierce v. Society of Sisters*, 268 U.S. 510, and *Cochran v. Board of Education*, 281 U.S. 370, on which the Court in *Allen* relied to some extent.

As shown above, the pertinent decisions of this Court establish that the State and federal governments are allowed considerable discretion and leeway consistent with the Establishment Clause, in accommodating religion. Indeed, in *Sherbert v. Verner*, *supra*, this Court held that a State was *compelled* by the Free Exercise Clause to provide an exemption for persons of particular religious views even though no exemption was necessary for anyone else. Surely Congress has equal power to decide to accommodate persons whose religious convictions forbid their participation in war in any form. To do so is not to establish religion, in the historical or contemporary sense.

2. Congress, moreover, can reasonably discriminate between religious and non-religious conscientious objectors, without violating the "equal protection" notion implicit in the Fifth Amendment. See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499. This remaining question, otherwise stated, is whether Congress acted arbitrarily or capriciously or engaged in invidious

discrimination in granting exemption to religious objectors, but not to those whose beliefs are not religious but essentially political, sociological, philosophical or based on a purely personal moral code. In our view, the judgment that only religious objectors should be exempt is one which Congress could legitimately make.

The heart of the legislative problem in exempting conscientious objectors, has always been to draw a fair line defining the limits of the exemption. Considering the continuum of beliefs ranging from the revealed commands of a fundamentalist God through modern Protestant, Catholic, Jewish, and other theology to moral philosophy, and ultimately to political judgments based upon the factors that must be weighed by the President and Congress in declaring war, raising armies, and appropriating money for the national defense, that task can be an exceptionally difficult one. Historically, the impetus behind the exemption for conscientious objectors came principally from the unwillingness of Congress to punish as a criminal one who refused to perform military service in obedience to what he believes is the command of a God transmitted by divine revelation. The unwillingness of the American people to compel an individual to disobey a divine command and yield to a human obligation imposed by government is older than the republic. The Court in *Seeger* recognized, however, that, in the modern world, the concept of religious believers cannot be narrowly confined to members of

recognized sects.¹⁵ It was acknowledged there, more over, that "religion" in the broad, constitutional sense, embraces a wide variety of views, some of which would not seem "religious" to persons adhering to essentially traditional concepts. As the Court there said (380 U.S. at 174):

Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution.

Nevertheless, however difficult it may sometimes be to draw the line, there is a qualitative difference be-

¹⁵ It might be maintained that limiting the scope of the conscientious objector exemption to those whose claims are religiously grounded is justifiable because a manageable, tangible standard susceptible of administrative and judicial application is thereby provided. Unless, however, the exemption were restricted to members of established sects of pacifists, it is doubtful that this purpose would always be effectively served. Even before *Seeger* and the resulting 1967 amendments to the act, the exemption was not so narrowly defined. And were it so limited, it is questionable whether it could sustain constitutional scrutiny. Nonetheless, the fact remains that the task of determining whether a particular individual's opposition to war is sincerely and fundamentally held is at best a difficult one. That task becomes immeasurably more complicated if those administering the system are called upon to determine whether one seeking an exemption genuinely holds to a moral or ethical creed or a personal code that is opposed to war. See Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. of Pitt. L. Rev. 695 (1958). Indeed, experience with the exemption as presently established amply attests to both its workability and its reasonableness (see *id.* at 702). See also Comment, 34 U. of Chi. L. Rev. 79, 104-105 (1966).

tween religion and the inner voice, on the one hand, and intellectual analysis and decision, on the other. An individual who disavows all religious beliefs (however broadly "religion" be defined), but who surveys the contemporary human scene and decides on the basis of political, sociological, and economic considerations that a particular war is wrong, or that all wars are wrong, is making a judgment in the field of human and social relations. However firm the conviction and unalterable the determination not to support the believed wrong, it is then a human judgment based upon the same factors as the government must consider in reaching its decision. It is not yielding to a higher power, however that power may be conceived or defined. A non-religious judgment is thus essentially a practical, analytic, or political judgment, no matter how sincerely or conscientiously held. This Court in *Seeger*, while recognizing the wide spectrum of religious beliefs currently extant, specifically noted, with apparent approval, that "[t]he section [6(j)] excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it" (380 U.S. at 173).

This qualitative difference between religious and non-religious objection to war is one which Congress could reasonably recognize in deciding whom to subject to involuntary military service. The Constitution does not set up freedom of conscience, it does not equate conscience with religion. Nor was Congress bound to do so. Congress could reasonably draw the line as to who shall and who shall not be compelled

to serve by taking into account, as the Constitution does, the right to exercise one's religion freely. It may be that valid reasons could be offered for drawing the line at some other point. But such argumentation should be made to Congress, not the courts. This was an appropriate place for legislative judgment; and the only issue here is whether Congress had the constitutional power to recognize religious objection to war in any form as a basis for exemption from military service (although requiring non-combatant or civilian service of the one so exempted), while declining to grant an equivalent exemption to a non-religious sincere objection. That is, in our view, a judgment which our Constitution empowers the legislature to make. It is implicit in the power expressly granted to raise and maintain armies.

Thus, we submit, no constitutional infirmity has been shown to inhere in the scheme prescribed by Section 6(j). The classification involved is not irrational, and there is no invidious discrimination against non-religious objectors. Certainly Congress has not acted arbitrarily when it concludes that there is a significant distinction between an individual whose religious beliefs command him not to kill because of the authority of what he regards as a higher power no matter how vaguely he defines it, and a person who, while believing it wrong to kill, essentially relates this to social, economic, and political considerations. That is the line Congress has sought to draw; the power of Congress to do so should be accepted by this Court. The question is not how this Court would resolve the problem, but whether Congress has gone beyond the limits of its

powers in reaching the accommodation it has prescribed.

Indeed, it has been repeatedly recognized that the task of reconciling the constitutional commands of the Establishment and Free Exercise Clauses is not exclusively a matter of judicial concern. Historically the legislative branch has played an important role in the numerous determinations of policy which relate to Church-State matters. Solution of these often delicate relationships has come as a result of the judiciary's affording the legislature a significant measure of discretion, even in those situations where any of the legislative alternatives will inevitably result in questions under either the Free Exercise or Establishment Clause. In circumstances where the tension between these provisions is heightened, the preferable course for the courts to follow is to extend even greater rein to the legislature, for the alternative is to substitute judicial attitudes for those of the elected representatives of the people on matters where the constitutional lines are not clear and where the considered view of the representatives of the people is entitled to great weight. Though one effect of statutes such as Section 6(j) may be to facilitate the practice of religion, the sound constitutional approach in construing the Establishment Clause in such circumstances is one of reasonable accommodation, not wooden application. That is the approach we urge here.

III. A REGISTRANT'S REFUSAL TO RE-EXECUTE AN ARMED FORCES SECURITY QUESTIONNAIRE DOES NOT WITHOUT A SHOWING OF POSSIBLE PREJUDICE PROVIDE A DEFENSE TO A PROSECUTION FOR FAILURE TO SUBMIT TO INDUCTION

On April 30, 1964, petitioner took a physical examination and was found fully acceptable for induction into the Armed Forces (SSF 25). At that time, he executed an Armed Forces Security Questionnaire (A. 47-50). However, when he reported to the induction station on December 8, 1965,¹⁶ he refused to re-execute such a questionnaire (*ibid.*). He maintains (Pet. Br. 23-29) that since Army regulations provide that no person who has not completed such a questionnaire is subject to induction, at least immediately, he could not properly be convicted of refusing to submit to induction. That argument is without substance, and warrants only brief discussion.

It is a well established rule that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox v. United States*, 200 F. 2d 398, 401 (C.A. 9); *Edwards v. United States*, 395 F. 2d 453 (C.A. 9), certiorari denied, 393 U.S. 845. We submit that this rule is particularly applicable in this case, as the court below properly concluded (A. 65-67).

Nowhere has petitioner suggested any information which would point to the conclusion that he would be a security risk. In fact, the FBI investigation conducted pursuant to his claim for conscientious objector status did not reveal any information that

¹⁶ This is the date on which petitioner refused to submit to induction.

would even suggest that petitioner would be rejected for security reasons. In view of these circumstances, we think that the court of appeals correctly held that "rejection by the Army for security reasons, like rejection for felony conviction, is wholly for the benefit of the Army and may be waived" (A. 67). See *Nickerson v. United States*, 391 F. 3d 760, 762-763 (C.A. 10), certiorari denied, 392 U.S. 907; *Korte v. United States*, 260 F. 2d 633, 637 (C.A. 9), certiorari denied, 358 U.S. 928. To accept petitioner's argument, is to allow any inductee who has concluded that he has no intention of permitting himself to be inducted to postpone his induction, possibly for months, while forcing the military to waste its intelligence resources in conducting a useless investigation. This, of course, conflicts with the important and overriding objective of the Selective Service System—"to raise an army speedily and efficiently." *Falbo v. United States*, 320 U.S. 549, 553.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

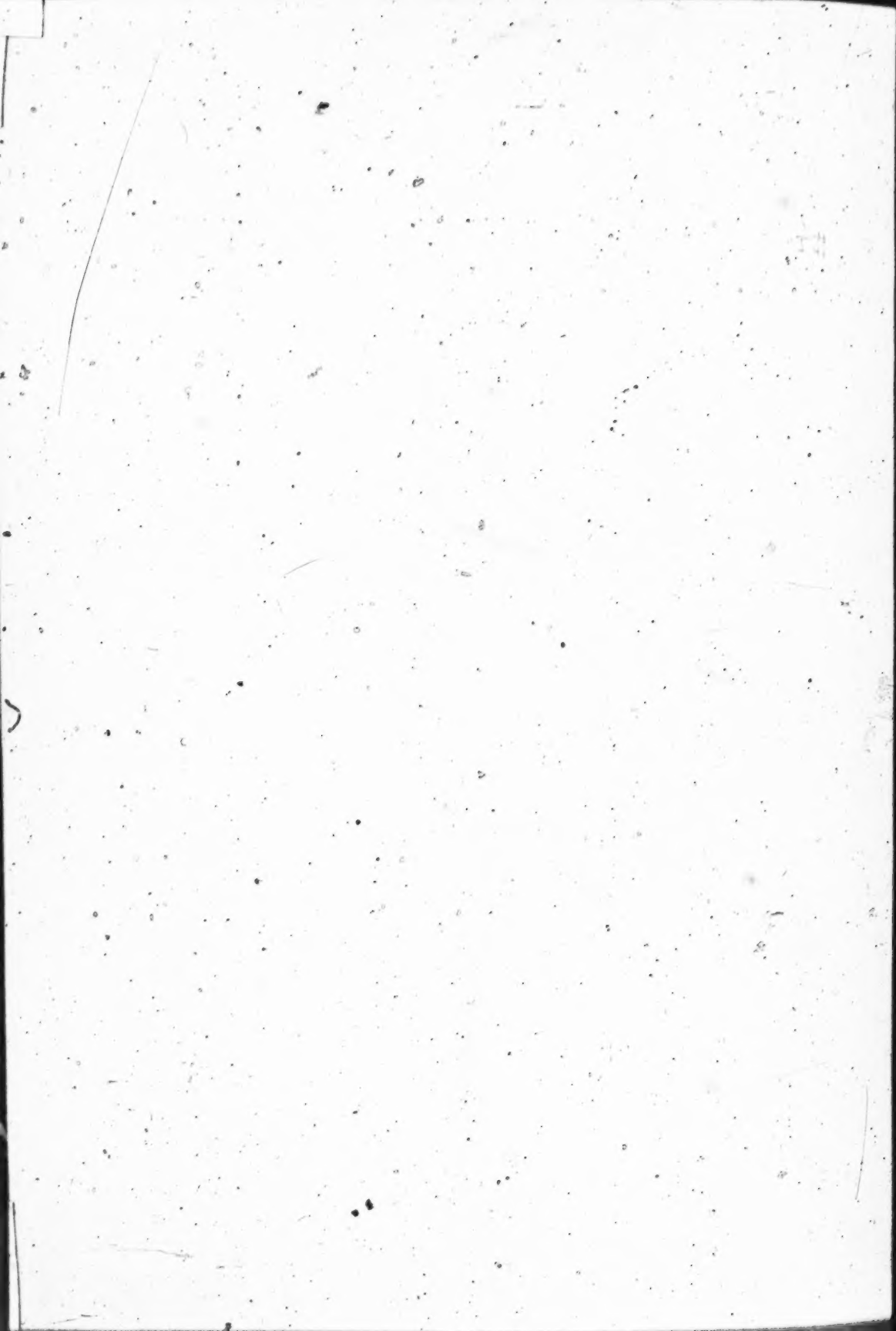
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ARGUMENT

Introductory.—This case involves the constitutionality of Section 6(j) of the Universal Military Training and Service Act. That provision exempts from combatant service and training any person “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.” Such persons remain subject to the draft but are assigned to non-combatant service or, if their religious beliefs require, to forms of national service outside the armed forces.

Section 6(j) defines “religious training and belief” as:

belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

The net effect is to exempt from combatant service or training but to subject to the universal obligation of assigned national service those persons whose conscientious opposition to war in any form is based upon belief in a relation to a Supreme Being imposing duties superior to all human relationships.

Although it is possible to read Section 6(j) as referring only to the iron commands of a fundamentalist God, transmitted by unquestionable divine revelation, we think that the test is considerably more liberal. In our view, which is explained at more length below (pp. 72-73) and in our brief in *United States v. Jakobson*, No. 51, this Term, Congress did not require belief in any particular kind of God,

and religious beliefs like those of such modern Protestant theologians as Professor Tillich and Dr. Robinson would satisfy the statutory requirement of "belief in a relation to a Supreme Being." The essence of the statutory standard lies in the contrast between duties resulting from man's relationship to his fellow men and superior obligations owed to a God or ideal fairly characterized as divine.³

However broadly the words of Section 6(j) are construed respondent Seeger does not qualify for the statutory exemption. His views are "a purely ethical creed." He based his refusal to participate in military training entirely upon his judgment concerning the effect war has upon men and human affairs. (R: 73). He derives his opposition to war, sincere as his conviction may be, not from religious teaching but from essentially political, sociological, or philosophical views. He is not responding to an obligation superior, in his conscience, to all human obligations; he is obeying a personal moral code based, according to his own statement, upon "how he feels towards his fellow man" (R. 5). Seeger's thoughtfulness and his steadfastness in pursuing what he deems right may command respect, but his views do not constitute the kind of belief in a divine obligation that Congress chose to exempt.

Since Seeger does not qualify for the statutory exemption, he is forced to attack its constitutionality

³ We use the adjective "divine" to denote not merely something "of or pertaining to God or a god" but also "more than human, excellent in a superhuman degree." *Shorter Oxford English Dictionary* (Oxford 1936).

and argue that since the government chose to exempt those whose opposition to war is based upon belief in a duty rising above all human obligations, the government must also exempt those whose conscientious opposition is based upon ethical convictions derived from political, social, or moral philosophy, or some combination of the three. The court of appeals accepted this view upon the ground that the Fifth Amendment, read with the First, requires Congress to treat alike all those whose opposition to war is based upon "a pervading commitment to a moral ideal" (R. 36).

The decision of the court of appeals is plainly inconsistent with the unanimous decisions of this Court in the *Selective Draft Law Cases*, 245 U.S. 366, 389-390; *Goldman v. United States*, 245 U.S. 474; *Kramer v. United States*, 245 U.S. 478, and *Ruthenberg v. United States*, 245 U.S. 480; indeed every court which has considered the question, including the court below, has upheld the constitutionality of Section 6(j). *United States v. Bendik*, 220 F. 2d 249 (C.A. 2); *United States v. Delime*, 223 F. 2d 96 (C.A. 3); *George v. United States*, 196 F. 2d 445 (C.A. 9), certiorari denied, 344 U.S. 843; *Clark v. United States*, 236 F. 2d 13 (C.A. 9), certiorari denied, 352 U.S. 882; *Etcheverry v. United States*, 320 F. 2d 873 (C.A. 9), cer-

*The court below purported to distinguish its earlier decision in *Bendik* on the ground that there the court had not considered whether Section 6(j) distinguished among religious groups.

tiorari denied, 375 U.S. 930; *Peter v. United States*, 324 F. 2d 173 (C.A. 9), pending on writ of certiorari, No. 29, this Term.

Two kinds of attack are leveled at the constitutionality of Section 6(j). One denies the power of Congress to exempt from combatant training and service that class of persons who oppose participation in war upon "religious" grounds, without exempting other objectors. The argument assumes that the definition of "religion" in Section 6(j) is unexceptionable and that the statute draws no improper distinction between different religions. See Kurland, *Religion and the Law* (1962) 37-38. The second line of attack is that approved by the court of appeals. It challenges the particular line of distinction drawn in Section 6(j), not as aid to religion violating the First Amendment, but as an unreasonable classification because, as the court defines "religion," "a line such as is drawn by the 'Supreme Being' requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment" (R. 38).

We deal separately with the two lines of analysis.

I

THE FIRST AMENDMENT PERMITS CONGRESS TO ACCOMMODATE THE FREE EXERCISE OF RELIGION WITH THE NEEDS OF NATIONAL DEFENSE BY ASSIGNING TO NONCOMBATANT SERVICE OR NATIONAL SERVICE OUTSIDE THE ARMED FORCES PERSONS WHO, BY REASON OF BELIEF IN A DIVINE OBLIGATION, ARE OPPOSED TO PARTICIPATION IN WAR IN ANY FORM

The cornerstone of any system of universal military service and training must be equality of obligation to the Nation. Those who are rendering more essential service in a civilian capacity may be deferred without violating that principle because they are fulfilling the obligation. A few compassionate exceptions, just in the eyes of the community, may also be acceptable. But the principle of equality of obligation, save in exceptional instances, is essential to an effective selective service law.

To impose an obligation to participate in combatant training and service upon a person whose religious beliefs forbid him to participate in war in any form interferes in a substantial sense with religious liberty.⁵ He is ordered to disobey what to him is a divine obligation superior to mere duties among men and if he disobeys, as he will, he is punished for obeying the religious duty. Section 6(j) attempts to accommodate the principle of equality of patriotic obligation with religious liberty by assigning the religious objector to noncombatant service or, if that too be inconsistent with his religious scruples, by assigning him to other national service.

We consider later the question whether Congress has drawn a permissible line in attempting to accom-

⁵ In arguing, as we do, that Congress may properly seek to avoid such interference, we intend no implication that Congress is constitutionally required to grant any exemption at all. This Court has stated the contrary. See *United States v. Macintosh*, 283 U.S. 605, 623-624 (dictum), overruled on other grounds, *Girouard v. United States*, 328 U.S. 61. See also *Hamilton v. Regents of the University of California*, 293 U.S. 245, 265-268, (concurring opinion of Mr. Justice Cardozo).

moderate recognition of the claims of religious liberty with the needs of national defense. The fundamental question at the threshold, however, is whether that accommodation is a permissible objective under the First Amendment.

The power of Congress to make such an accommodation is squarely sustained by prior decisions. In the *Selective Draft Law Cases*, 245 U.S. 366, the Court upheld the Selective Draft Law of 1917, which included an exemption for persons who were members of religious sects opposed to war in any form, provided their own religious convictions were the same. The Court unanimously* held that (*id.* at 389-390):

[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clause of the act * * * because we think its unsoundness is too apparent to require us to do more.

The argument rejected was that Congress could not constitutionally favor religion as a whole, nor favor religious men who belonged to particular sects over other religious men.

A week later, the Court reaffirmed this determination, in *Goldman v. United States*, 245 U.S. 474,

*The opinion was written by Chief Justice White. The remainder of the Court consisted of Justices McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, and Clarke.

*See Brief on Behalf of the Plaintiffs-in-Error in No. 702, Oct. Term 1917, pp. 33-40, adopted by reference in Brief on Behalf of the Plaintiffs-in-Error in No. 681, Oct. Term 1917, p. 9. See also Brief for the United States in Nos. 656, 663, 664, 665, 666, 680, 681, 702, 738, pp. 82-83.

Kramer v. United States, 245 U.S. 478, and *Ruthenberg v. United States*, 245 U.S. 480, by merely citing the *Selective Draft Law Cases*. In *Goldman and Kramer*, the argument advanced was the same as in the earlier case.⁸ In *Ruthenberg*, the exemption was held constitutional over the claims that it violated freedom of religion (1) to allow an exemption to objectors who opposed war and belonged to a sect which opposed all war, but not to religious objectors who did not belong to such a sect; and (2) to give an exception to objectors who based their position on religious conviction, but not to those whose views came from within themselves.⁹ Accord, *Yanyar v. United States*, 246 U.S. 649;¹⁰ *Stephens v. United States*, 247 U.S. 504.¹¹

Thus, the Court had presented to it the exact question involved in this case—whether granting an exemption to persons who will not participate in war because of religious convictions, while failing to grant one to non-religious conscientious objectors violates the First Amendment. Indeed, if anything, the issue in the earlier cases was presented in a more difficult context since the World War I statute restricted the exemption to members of religious sects and made no provision for the unaffiliated believer. Nevertheless, the Court rejected the contention as frivolous.

⁸ See Brief on Behalf of the Plaintiffs-in-Error in No. 702, Oct. Term 1917, pp. 33-40, adopted by reference in Brief on Behalf of the Plaintiffs-in-Error in No. 680, Oct. Term 1917, p. 9.

⁹ See Brief for Ruthenberg, et al. in No. 656, Oct. Term 1917, pp. 1-9.

¹⁰ See Motion by the United States to Dismiss or Affirm, Nos. 767, 768, Oct. Term 1917, p. 3.

¹¹ See Brief of Plaintiff-in-Error Contra Motion to Dismiss or Affirm, No. 813, Oct. Term 1917, pp. 2-5.

On principle the earlier decisions are correct. An exemption for religious conscientious objectors does not constitute an establishment of religion, nor does it grant forbidden preferences to the religious or impose disabilities upon non-religious men. Plainly, the exemption does not interfere with, much less prohibit, the full freedom of non-religious objectors to refuse to believe in or practice religion. They are not subjected to invidious discrimination or disqualification. The sole effect upon them is that they, like millions of others, do not receive an exemption available to religious objectors. The question narrows, therefore, to whether Congress, by such an exemption, grants a preference for religion in violation of the purposes of the First Amendment. Cf. *Everson v. Board of Education*, 330 U.S. 1, 15-16.¹²

There is no basis for an argument that since the exemption runs only to persons who believe in a Su-

¹² It is significant that Leo Pfeffer, an exponent of a broad interpretation of the establishment clause, believes that the exemption for religious conscientious objectors is constitutional. Pfeffer, *Church, State, and Freedom* (1953) 509-510.

Numerous other books and law reviews have commented on this issue. Those supporting the constitutionality of Section 6(j) include: Katz, *Religion and American Constitutions* (1964) 20-21; Drinan, *Religions, the Courts and Public Policy* (1963) 15-20. Other articles assume constitutionality. Waite, *Section 5(g) of the Selective Service Act, as Amended by the Court*, 29 Minn. L. Rev. 22 (1944); Russell, *Conscientious Objector Recognition*, 20 Geo. Wash. L. Rev. 409 (1952). As to books and articles taking the position that the statute is unconstitutional, see Kurland, *Religion and the Law* (1962) 37-38; Donnici, *Government Encouragement of Religious Ideology*, 13 J. of Pub. L. 16 (1964); Conklin, *Conscientious Objector Provision*, 51 Geo. L. J. 252 (1963) (criticizing *Torcaso v. Watkins*, 367 U.S. 488, but saying that, if that decision is followed, Section 6(j) is invalid); Freeman, *Exemptions from Civil Responsibility*, 20 Ohio St. L. J. 437 (1959).

preme Being it might conceivably influence persons to become religious. It is scarcely conceivable that anyone would adopt or change his religion in an effort to be assigned, as a conscientious objector, to some non-combatant form of service; if the facts became known, such a man could not qualify for the exemption. Moreover, persons such as respondent are by definition so unyielding in moral opposition to war that they are willing to suffer imprisonment rather than bear arms. Surely, they would not be likely to change their views of religion so lightly; if they would, there is no good reason to credit their convictions as to war. In every substantial sense Section 6(j) takes men as it finds them and calls upon them for that form of national service that does the least violence to their religious beliefs.

The wall between church and state erected by the establishment clause does not require the government to ignore religious beliefs in the framing of legislation dealing for secular purposes with conduct conforming, in some instances, to the dictates of religion. The aim of the exemption, as we have seen, is to alleviate the harshness which would result if individuals were compelled to flout the commands of their religion in order to obey those of the State. For the State to avoid such an intrusion upon freedom of religion is an effort to remain neutral—to avoid the penalization of religion, rather than to prefer it.¹³

¹³ In *Torcaso v. Watkins*, 367 U.S. 488, a disability was imposed upon a non-believer for his views. That, of course, is quite another matter. *Torcaso* obviously does not mean that a non-believer is exempt from the obligations which fall upon citizens generally because his convictions are inconsistent with the laws which impose them. His amenability to such regulation does not raise a First Amendment issue.

A significant number of recent decisions of this Court recognize, and even require, that such accommodations be made in order to minimize conflict between religious belief and governmental regulation. *Girouard v. United States*, 328 U.S. 61, held that Congress had not barred from citizenship an alien who refused, for religious reasons, to swear that he is willing to bear arms. It is not entirely clear from the opinion whether the Court held (1) that Congress had not authorized a requirement of willingness to bear arms as a condition of citizenship; or (2) that Congress authorized the imposition of such a requirement but did not intend it to apply to religious conscientious objectors. The latter, however, appears to be the correct interpretation since the Court repeatedly referred to freedom of religion. For example, it stated (*id.* at 68):

The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

It is of course implicit in that statement that such accommodations of religious liberty do not violate the establishment clause.

In *Everson v. Board of Education, supra*, the Court again recognized the power of government to accommodate religion in order to avoid interference with freedom of religion, declaring (330 U.S. at 18):

Of course, cutting off church schools from [various municipal services such as police and fire protection], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

The Court then upheld the payment of bus fares to children attending parochial, as well as public, schools.¹⁴

Subsequently, in *Zorach v. Clauson*, 343 U.S. 306, the Court sustained a public school program releasing children to attend religious instruction in their own places of worship. There, the Court said (*id.* at 313-314):

We are a religious people whose institutions presuppose a Supreme Being. We guarantee

¹⁴ In his dissenting opinion, in which he said that such State aid to religion was unconstitutional, Mr. Justice Rutledge stated that "the only serious surviving threat" to the separation of church and state required by the First Amendment was "through use of the taxing power to support religion." 330 U.S. at 44.

the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. * * * When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. * * * The government must be neutral when it comes to competition between sects. It may not trust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.

As examples, the Court pointed to excuses from school for religious observances such as Catholic Days of Obligation, Yom Kippur, or baptisms. The Court distinguished *McCollum v. Board of Education*, 333 U.S. 203, where it had held unconstitutional a program of religious instruction in the public schools, on the ground that "released time" outside the schools was merely an accommodation of religion. The Court nowhere suggested that non-religious parents had the right to have their children released for non-religious purposes; indeed, the released-time program before the Court clearly did not allow for this. 343 U.S. at 308-309, note 1. Thus, the Court upheld an accommodation of religion even though no equivalent ex-

emption from attendance was extended to non-religious persons.

In the Sunday Blue Law cases (*McGowan v. Maryland*, 366 U.S. 420, *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, *Braunfeld v. Brown*, 366 U.S. 599, and *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617), this Court upheld the statutes on the ground that they had a secular, not a religious, purpose. However, Mr. Justice Brennan, in his concurring and dissenting opinion in *Braunfeld*, concluded that the free exercise clause prevented Orthodox Jews from being required to close their businesses on Sunday since their religion prescribed that they be closed on Saturday and two days' closing would cause them serious economic injury. In doing so, he rejected the claim that such an exemption from the blue laws for persons of one religion would constitute an establishment (366 U.S. at 615):

Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that "its unsoundness is too apparent to require" discussion. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). However widespread the complaint, it is legally baseless * * *.

Thus, Mr. Justice Brennan relied on the decision of this Court upholding the predecessor to the exemption

provision involved in this case to demonstrate that the government, in the interest of religious freedom, may, and indeed in some instances *must*, make a special accommodation to religious belief.¹⁵

The plurality opinion of the Chief Justice disagreed with Mr. Justice Brennan's view and stated that the States were not required by the free exercise clause to grant Orthodox Jews an exemption from the blue laws. 366 U.S. at 608-609. However, it never suggested that, if an exemption were granted—as 21 of the 34 States which had Sunday blue laws in fact did (see 366 U.S. at 614, note 1)—it would be unconstitutional under the establishment clause. Quite the contrary, the Court indicated that “this may well be the wise solution to the problem.” *Id.* at 608.

Mr. Justice Frankfurter, joined by Mr. Justice Harlan, similarly rejected the contention of the Orthodox Jews on the ground that “[t]heir ‘establishment’ contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear.” 366 U.S. at 468. He then cited the *Selective Draft Law Cases* which held that the World War I version of Section 6(j) did not violate the First Amendment. And finally he stated that “[h]owever preferable, personally, one might deem

¹⁵ Mr. Justice Stewart in his dissenting opinion, said that he agreed “with substantially all” of Mr. Justice Brennan's opinion. 366 U.S. at 616. For these same reasons, Justices Brennan and Stewart dissented in *Gallagher v. Crown Kosher Super Market, supra*, 366 U.S. at 642.

such an exception [for those who observed the Saturday Sabbath],” he could not “find that the Constitution compels it” since several considerations provided reasonable justification for the legislature’s refusal to adopt it. 366 U.S. at 520. Thus, all of the Justices who commented on the issue¹⁶ agreed that an exemption from the blue laws limited to persons who, because of religious belief, were required to close their businesses on Saturday would not violate the First Amendment.¹⁷

In his concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203, 295, which held that the Bible may not be read and the Lord’s Prayer may not be recited as part of the public school curriculum, Mr. Justice Brennan again referred to the interrelationship of the free exercise and establishment clause:

Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for one society. Likewise nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual’s religious beliefs. Surely the framers would never have understood that such a construction

¹⁶ Mr. Justice Douglas, in dissenting, did not reach the issue of a special exemption for Sabbatarians since in his view any requirement that businesses close on Sunday violated the free exercise and establishment clauses. See 366 U.S. at 577–578.

¹⁷ It has recently been proposed that Congress grant to Amish Mennonites an optional exemption from the social security self-employment tax. See Cong. Rec., September 2, 1964 (daily ed.), pp. 20699–20702.

sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.¹⁸

Similarly, Mr. Justice Goldberg, joined by Mr. Justice Harlan, stated in a concurring opinion (374 U.S. at 306):

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require it to do so. * * * [T]he required and the permissible accommodations between state and church frame the relation as one free from hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other.

And Mr. Justice Stewart in his dissenting opinion emphasized the necessity of avoiding use of the establishment clause so as to interfere with the free exercise of religion, which is also guaranteed by the First Amendment. *Id.* at 308-320.

Finally, in *Sherbert v. Verner*, 374 U.S. 398, this Court held that a State may not deny unemployment compensation benefits to a person who will not work Saturdays because of her religious beliefs, on the ground that she refused employment which required

¹⁸ The majority opinion did not consider this point.

such work. This holding was based on the free exercise clause of the First Amendment and therefore did not apply to persons of religious faiths who were not forbidden to work on Saturdays or to the non-religious. The Court explicitly rejected the argument that this holding itself constituted an establishment of religion on the ground that it "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Id.* at 409. Mr. Justice Stewart, concurring in the result, agreed that the State was required by the free exercise clause to treat a person differently when her refusal to work is based on religious convictions than when it is grounded on other reasons and that this did not violate the establishment clause. *Id.* at 413-417. Mr. Justice Harlan, joined by Mr. Justice White, dissented on the ground that the free exercise clause did not require the State to make an exception for persons who refused to work because of religious conviction. The opinion went on, however, to say (*id.* at 422-423);

[I]t would be a permissible accommodation of religion for the State if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" * * * is not so narrow a channel that the slightest deviation from an absolutely straight course

leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. * * * [T]here is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

Thus, the Court was unanimous on the proposition that, whether or not in a particular situation the State is constitutionally required to do so, it may give an exemption limited to religious persons in order to avoid interference with full freedom of religion.

As we have seen, the decisions of this Court establish that the State and federal governments have considerable discretion in accommodating religion. This power is particularly clear when the legislation is attempting to avoid interference with religious freedom. Indeed, in *Sherbert v. Verner*, this Court held that a State was *compelled* by the free exercise clause to provide an exemption for persons of particular religious views even though no exemption was necessary for anyone else. Surely, Congress has equal power to decide to accommodate persons whose religious convictions forbid participation in war.¹⁹

¹⁹ That, of course, was the express holding of the *Selective Draft Law Cases*, discussed at pp. 21-22 above.

II

THE DEFINITION OF THE CLASS EXEMPTED FROM COMBATANT SERVICE AND TRAINING BY SECTION 6(j) IS A PERMISSIBLE CLASSIFICATION REASONABLY ACCOMMODATING THE NEEDS OF NATIONAL DEFENSE WITH THE INTEREST IN RELIGIOUS LIBERTY SAFEGUARDED BY THE FIRST AMENDMENT

In judging the constitutionality of the classification which Congress established by Section 6(j) it is essential to keep in full perspective the legislative problem of defining any exemption for conscientious objectors. For the question here is not whether concern for the rights of the individual citizen, as opposed to the collective mass of society, should lead to a policy of exempting all persons who can be said to have conscientious scruples against military service, or whether a personal moral code is as "good" or as "worthy of respect" as a religious conviction based upon belief in a divine obligation. The framing of a draft law involves legislative judgments that the courts may not supersede unless the legislature exceeds its function. Assuming that Congress may constitutionally seek to accommodate the free exercise of religion with the needs of national defense, as we have contended, by assigning religious objectors to war in any form to noncombatant service, then the only remaining justiciable question is whether Congress acted arbitrarily or capriciously, or engaged in invidious discrimination.

The heart of the legislative problem in exempting conscientious objectors has always been to draw a

fair line defining the limits of the exemption in what now seems to us to be a continuum of beliefs ranging from the revealed commands of a fundamentalist God through modern Protestant theology to moral philosophy and ultimately to political judgments based upon the very considerations that must be weighed by the President and Congress in declaring war, raising armies, and appropriating money for the national defense. Nor can the problem be abstracted from its historical evolution among the traditions and fundamental beliefs of the American people.

The polar cases are easy to deal with. The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of a God transmitted by divine revelation. The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation.²⁰

Quite different is the situation of the individual who disavows all religious beliefs (however broadly "religious" be defined) but who studies the contemporary human scene and decides on the basis of political, sociological, and economic considerations that a particular war is wrong, or that all wars are wrong, as a matter of human relations. However firm the

²⁰ See pp. 41-72 below.

conviction and unalterable the determination not to support the wrong, it is then a human judgment based upon the same materials as the government must canvass in reaching its decision. No State has ever permitted individual citizens to set their political judgments of how to conduct human affairs over the judgment of the community. Respondent's views appear to differ somewhat from this polar position, and we take it that no one is seriously contending that the Constitution requires extending the exemption to anyone with a sincerely held political or social objection to war in any form.

Between the polar cases lies a vast middle ground where the lines between different beliefs and opinions are subtle, wavering, and uncertain. Should one distinguish between him whose religion is purely faith in an unquestionable command of God revealed in the Scripture and his co-religionist of the same creed who reached his convictions solely through the path of logic? Rigid adherence to some definitions of religion would seem logically to exclude those who state that they pray to a Christian God solely because logical analysis demonstrates His existence. For one of the central points in some definitions of religion is that it deals with beliefs lying beyond what can be observed by the senses or demonstrated by logical analysis. Judge Augustus N. Hand evidently had this in mind when he wrote in *United States v. Kauten*, 133 F. 2d 703, 708:

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his uni-

verse—a sense common to men in most primitive and in most highly civilized societies. It accepts the aid of logic but refuses to be limited by it.

Yet to make that the sole test is open to the objection that it excludes from the category of religious many men who are active communicants in established religious sects.

Similarly, there is a marked difference, from some viewpoints, between the fundamentalist who believes in a personal God up in heaven and the modern Protestant theologian, such as Professor Tillich²¹ or Dr. Robinson,²² who conceive God as the ultimate ground or depth of our being, while, from other viewpoints the differences are immaterial and any space between is occupied by shadings of opinion in which the differences of degree are often scarcely distinguishable.

To move quickly to the other end of the total range, we suggest that there is also no universally acceptable, clear-cut line of distinction between an ethical or moral code, unrelated to religion, and political or social convictions. There have been employers who firmly believed that it was "wrong" to sign a union shop contract because no man should be compelled to join a labor union, and some employers were prepared to sacrifice business advantage to that conviction. Probably none would have claimed religious sanction for their views but a number could sincerely claim that

²¹ H. Tillich, *Systematic Theology* (1957) 9.

²² Robinson, *Honest to God* (1963) 45-63.

they acted out of conscience. Here again, however, the line between "conscience" and social or political opinion is only a difference in degree. The problem is no different in separating moral from political objections to war in any form.

We may note parenthetically that there are also practical objections to any exemption of the breadth which respondent urges. It is, to begin with, a rather difficult task to determine when a religious objection is sincerely held. See Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. of Pitts. L. Rev. 695. This task would become immeasurably more complicated and difficult if the administrators of the system were called upon to determine whether one seeking an exemption sincerely holds to a moral or ethical creed or code opposed to war. *Id.* at 711. Professor Field, an English student of the problem who has had long experience with the British system, has observed; Field, *Pacifism and Conscientious Objection* (Cambridge University Press, 1945) 4:

It will be seen, then, that Pacifism or Conscientious Objection is not one single simple creed, but a number of creeds, based on widely different and sometimes diametrically opposed general principles. This obviously makes the task of critical evaluation particularly difficult. Indeed, it would not be too much to say that criticism of Pacifism is impossible; there can only be criticism of various pacifist arguments, some of which have little or no connection and may, indeed, be in contradiction with one another.

We do not urge that difficulties of this kind constitute an insuperable objection to a law granting broader exemptions than those presently provided. We make only the point that the difficulties are surely no less substantial than under the statutory test.

The difficulty in drawing any line is enhanced by the fact that the "importance" of any distinction in this area almost inescapably depends upon the subjective views of the observer. The fundamentalist, for example, sees little difference between the Protestant theologians exemplified by Professor Tillich and Dr. Robinson, on the one side, and the humanists like Julian Huxley, on the other,²³ but Mr. Huxley and Dr. Robinson see a world of difference.²⁴ Again, a devout believer in a Supreme Being might see no significant difference between a purely personal moral code condemning all forms of violence and purely political objections to war and the recruitment or training of armies in an age of nuclear bombs.

Despite the difficulty some line has to be drawn in the drafting and in the administration of a universal military service law, unless the polar cases are to be lumped together and a choice made either to deny exemption to all conscientious objectors or else to allow any individual to avoid combatant service if his sincere political convictions make him opposed to war in any form. Perhaps a line could have been drawn which distinguished moral philosophy from political economy. Possibly the test might be framed

²³ See Huxley, *Religion Without Revelation* (1927); Huxley, *Essays of a Humanist* (1964).

²⁴ See *id* at 218-222; Robinson, *Honest to God*, *supra*, pp. 127-129.

in terms of conscience as opposed to political, economic, or sociological opinion. The line was drawn, by the body to which the responsibility for raising armies was confided, in terms of the difference between human and divine obligations. It is not ground for invalidating the statute that a court concludes, even rightly, that the line might better be drawn at another point. Nor is it material that the distinction between two borderline cases, when they are viewed in isolation, may seem hardly more than fiat. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Holmes, J., dissenting in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41. The Act does not offend the Fifth Amendment unless it is shown that Congress acted arbitrarily and capriciously or engaged in invidious discrimination.

We submit that the case is just the contrary—that the definition of the class exempted from combatant service by Section 6(j) plainly appears, when the foregoing problems are kept in mind, to be a reasonable method of accommodating the interest in religious liberty with the needs of national defense. That conclusion, we submit, is confirmed by four further considerations.

A. THE HISTORICAL EVOLUTION OF THE DEFINITION OF A RELIGIOUS
OBJECTION TO PARTICIPATION IN WAR IN ANY FORM SHOWS THAT
IT IS NEITHER ARBITRARY NOR INVIDIOUS

Section 6(j) is the culmination of years of experience. The practice of exempting from military service "conscientious objectors" opposed to war in any form is as old, in the United States, as military conscription. The scope of the exemption has changed from time to time but, with one exception not authorized by Congress, it has always been limited to those whose opposition was based upon religious belief.

1. Pre-Civil War

Until the Civil War, when both the federal government and the Confederacy adopted national conscription, the only compulsory military service in this country was in the muster of the State militia. Conscripted militia service was employed in the various colonies to provide defense against Indian attack. Conscientious objectors, during this early period, consisted principally of members of four historic "peace churches" who were among the earliest immigrants to the North American continent: the Religious Society of Friends, or Quakers; the Church of the Brethren, whose members were sometimes called Dunkards; the Mennonite Church, which includes the Amish and the Hutterites; and the Moravians, or United Brethren. At first, members of those churches were sometimes imprisoned or subjected to heavy taxes or fines because of their refusal to render service, but on other occasions they were granted exemp-

tions. *Selective Service System Monograph No. 11, Conscientious Objection* (1950) 29.

Gradually, more and more of the State legislatures provided relief to persons whose religious convictions prohibited participation in war and permitted them to serve in noncombatant service. Of the original thirteen colonies, the first to provide relief were Massachusetts (1661), Rhode Island (1673), and Pennsylvania (1757).²⁵ *Monograph No. 11*,²⁶ p. 30; *Selective Service Special Monograph No. 1, Backgrounds of Selective Service* (1947), vol. II, part 6, p. 73; *id.* part 12, pp. 13-17; II Godcharles, *Pennsylvania, Political, Governmental, Military* (1933) 4.

In granting the exemptions, the State legislatures were aware of two facts. The first was that pacifism was an essential part of the tenets of the "peace churches," based upon a literal reading of the Bible. Thus, in 1775, the Quakers, in voicing their opposition to a proposal in the Pennsylvania House of Representatives that the exemption for religious scruple be modified, stated that their religious principles were "founded on the Example and express Injunction of Christ our Lord and Lawgiver." *Monograph No. 11*, p. 35; *Pennsylvania Archives*, 8th series, vol. III (1935) 7326-7330. Similarly, the Annual Conference

²⁵ Before the State legislature acted, Parliament in 1740 exempted the Germans of Pennsylvania from participation in the Indian wars on the ground of religious scruples. Stokes and Pfeffer, *Church and State in the United States* (1964) 474.

²⁶ The first reference in this and similar succeeding citations is to the monograph. The second reference is to the citation given in the monograph.

of the Brethren, when asked in 1817 whether members could "go on the muster ground or not," replied that a member who did so "could not be in full fellowship with the church, for the Savior said to Peter, 'Put up thy sword into his place; for all they that take the sword, shall perish with the sword.'" *Monograph No. 11*, p. 39; Church of the Brethren, *Minutes of the Annual Meetings, 1778-1909* (Brethren Publishing House, 1909) 40-41.

Second, the early legislators were aware that under no circumstances, even to defend their lives and property, would practicing members of the peace churches take up arms. There were striking illustrations. In one instance, thirty Dunkards were massacred by Indians in less than forty-eight hours, but they nevertheless refused "a stirring appeal" from a lieutenant-colonel of militia to arm themselves for their own defense. In another instance, a Dunkard, in defense of his mill and his life, killed two Indians who were stragglers from a group which had massacred a Dunkard community; as a result of his action, he was excommunicated from his church and forced out of business by a boycott by his former co-religionists. *Monograph No. 11*, pp. 32-33; Jones, *History of the Early Settlement of the Juniata Valley* (Henry B. Ashmead, 1856) 208-209, 215-216.

It may be that the early exemptions from militia service did not reflect respect for religious scruples so much as recognition that any attempt to force the members of the peace churches to bear arms was doomed to fail. In any event, the exemptions were limited in scope, freeing the objector from the duty of

bearing arms but making no further accommodation to his pacifist principles. Thus, an early Pennsylvania statute (March 29, 1757), while it permitted members of the peace churches to appear at militia alarms without weapons, nevertheless required them to obey the commands of officers and perform generally helpful services, including "extinguishing fires" and "conveying intelligence as expresses or messengers." *Monograph No. 11*, p. 30; II Godcharles, *Pennsylvania, Political, Governmental, Military, supra*, p. 4. Later enactments coupled the exemption with a requirement that the person relieved supply a substitute or the money necessary to hire one (see the statutes cited in *Hamiton v. Regents of the University of California*, 293 U.S. 245, 266-267 (Mr. Justice Cardozo concurring)). This was done despite the contention of the peace churches that their creeds forbade the payment of a commutation fee as well as the rendering of personal military service. For example, during the Indian Wars, the Dunkards "refused in the most positive manner to pay a dollar to support those who were willing to take up arms to defend their homes and their firesides, until wrung from them by the stern mandates of the law, from which there was no appeal." *Monograph No. 11*, p. 32; Jones, *History of the Early Settlement of the Juniata Valley, supra*, pp. 208-209.

Similarly, despite the opposition of the Quakers that they "could not for Conscience Sake bear Arms; nor be concerned in warlike Preparations, either by personal Service or by paying any Fines, Penalties or Assessments, imposed in Consideration of our Ex-

emption from such Services," the Pennsylvania House of Representatives, in 1775, modified the pre-existing exemption to require all those who did not serve in the "military Association" of the Province "to contribute an Equivalent to the Time spent by the Associators in acquiring the military Discipline." *Monograph No. 11*, pp. 35-36; *Pennsylvania Archives, supra*, pp. 7351. The requirement is an interesting historical antecedent of the present practice of exempting religious objectors from combatant positions but assigning them to other forms of national service under the Selective Service Act. In a substantial sense both adapt the form of compulsory service to the beliefs of the objector instead of granting an exemption.

Although the concept of an exemption for religious objectors originally appears to have sprung primarily from practical considerations, by the onset of the Revolution it had gained acceptance on the basis of toleration of religious beliefs. Thus, in 1775 the Continental Congress adopted a resolution stating that it intended no violence to the consciences of those "who from Religious Principles cannot bear Arms in any case," but urging such people to make such "services to their oppressed country, which they can consistently with their Religious Principles." *Monograph No. 11*, pp. 33-34; *X Minutes of the Provincial Council of Pennsylvania from the Organization to the Termination of the Proprietary Government* (Theo. Fenn and Co., 1852) 293. In 1776, the Maryland Convention authorized the Committees of Observation to remit in whole or in part the fines as-

sessed by them for failure to enroll in the militia, and recommended that in doing so the Committees "make a difference between such persons as may refuse from religious principles, or other motives." *Monograph No. 11*, p. 37; *The American Archives*, 4th series, vol. VI (M. St. Clair Clark and Peter Force, 1846) 1504.

When the Bill of Rights first came under consideration in the House of Representatives, James Madison proposed that "no person religiously scrupulous shall be compelled to bear arms." I *Annals of Congress* 749. The chief argument for the proposal was offered by Representative Boudinot, who pointed out that those opposed to bearing arms on the basis of their religion "would rather die than use them" and "adverted to several instances of oppression on this point" that occurred during the Revolutionary War. *Id.* at 767. Representative Scott, on the other hand, opposed the provision because it might be construed as extending to those who were not religious (*ibid.*):

There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.

Representative Gerry, who feared that the proposal in the form presented might vitiate the provision to which it was attached (what is now the Second Amend-

ment right of the people to keep and bear arms), wished to restrict the exemption to "persons belonging to a religious sect scrupulous of bearing arms."

I Annals of Congress 750. Representative Benson opposed the provision because (*id.* at 751):

No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.

I have have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.

He therefore moved to strike the provision from the proposed amendment, but his motion failed by the narrow margin 24 to 22. *Ibid.* Representative Jackson proposed amending the provision by adding the words "upon paying an equivalent," and Representative Smith of South Carolina thought that those excused should be required to find a substitute. *Id.* at 750. Neither proposal was put to a vote, but the words "in person" were added to the clause prior to its being adopted by the House. *Id.* at 767.

The provision was not accepted by the Senate and never became part of the Constitution. There is no account of the Senate debate, and one can only specu-

late as to whether its rejection of the provision was based upon agreement with Representative Scott's view that the right to a non-religious exemption might thereby be established or agreement with Representative Benson's view that the matter should be left to legislative discretion. It clearly appears, however, from the arguments on the proposal, that to the extent that there was sentiment for making exemption for conscientious objection a constitutional right, it arose from a desire to accommodate only those who believed they were prevented from bearing arms by the requirements of their religion.

At the end of the War of 1812, while the outcome of peace negotiations was awaited, bills authorizing the President to call up the militia of the States and territories were passed by both the Senate and the House of Representatives (although no law was passed, since the Treaty of Ghent was received before the two houses could resolve their differences). Included in the House version was a section, proposed by Representative Lewis of Virginia and adopted, without debate "by a large majority," which provided (28 Annals of Congress 774-775):

That every person who is a member of any religious sect or denomination of Christians,²⁷ conscientiously scrupulous of bearing arms, shall be exempted from the performance of the duties required by this act, by paying his due proportion of the amount contracted to be paid by the class in which he is concluded, according

²⁷ At that time, there were probably no non-Christian religions in the United States which were opposed as a matter of doctrine to all wars.

to the provision of the fourth section of the act; or, in case there shall be a draught in such class, by paying to the person draughted such sum as shall be ascertained by the commanding officer of the company, so that the sum shall not exceed three months' pay; and the payment of such sum of money, in either case, shall be considered as entitling such person to an exemption from all the duties required by this act.

Representative Lewis stated that he offered the amendment because his own State of Virginia gave no exemption "on account of religious faith and conscientious scruples," and the practice had grown there of calling up non-resisters, court-martialing them when they refused to serve, assessing heavy fines, and then placing them in the next class and repeating the process, until they were reduced to ruin. 28 Annals of Congress 772-773. He stated that justice required an exemption for persons of religious scruple because (*id.* at 774):

[A]s to personal service in arms, if any man conscientiously believed it was forbidden by the voice of God, no human tribunal had the right to force such a man to violate his religion and his conscience, and to stain his hands with human blood.

2. *The Civil War*

At the start of the Civil War, the draft was regulated by the States in both the North and the South. *Monograph No. 11*, p. 43. North Carolina provided in 1861 for an exemption for persons who have "religious scruples" against bearing arms, and Virginia provided in 1862 for such an exemption if "the tenets

of the church to which [the] applicant belonged" prohibited military service. *Monograph No. 11*, pp. 43-44; N.C. Public Laws, 2d Extra Sess. 1861, pp. 23-24; Acts of the General Assembly of Va. (1862), pp. 50-51.

The first federal conscription laws (as contrasted to laws providing for the calling up of the State militia) were enacted during the Civil War. The Confederacy did likewise. The original statutes enacted by both sides established a general exemption which could be obtained by furnishing a substitute or providing the money to hire one, but made no specific provision for exemptions for conscience. *Monograph No. 11*, pp. 41, 45. Within six months of its adoption of such a statute, however, the Confederate Congress extended an exemption by name to members of the "peace churches"—the Quakers, Dunkards, Nazarenes, and Mennonites—"in regular membership in their respective denominations" if a substitute was furnished or a tax of five hundred dollars paid into the public treasury. Public Laws of the Confederate States of America, 1st Cong., 2d Sess., ch. 45 (October 11, 1862).²⁸ Similarly, the federal statute was superseded by a statute which provided (13 Stat. 9):

That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered non-combatants, and shall be assigned by the

²⁸ The provisions of the First Amendment were adopted *in haec verba* by Article I, Section 9, Clause 12 of the Confederate Constitution.

Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers: *Provided*, That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his deportment has been uniformly consistent with such declaration.

Both Confederate and Union statutes continued the historic policy of exempting only those objectors whose membership in religious sects taught them that they were forbidden to bear arms by divine command. The legislative history of the federal statutes makes the point explicit. Thus, Congressman Garfield stated that he was "willing to exempt men who, from their religious creed, were absolutely prohibited from engaging in war" (63 Cong. Globe 576), and Senator Doolittle spoke against "compelling members of religious denominations by whose faith and creed it is regarded as a sin against God to bear arms even in self-defense, to go into the ranks to do military service" (*id.* at 208). Senator Wilson observed that Quakers, as a class, had proved their conscientious opposition to bearing arms "by more than one hundred years of profession and practice," and voiced approval for the proposal which he understood to grant exemptions to those "who belong to a religious denomination of which opposition to bearing arms is a part of the faith and creed." *Id.* at 206. Senator Saulsbury stated that he would not require Quakers to do

military duty "when they have been brought up from their early childhood in opposition to bearing arms" (*id.* at 204), and Senator Anthony noted that while the opinion of the Quakers on the subject of military participation "may seem very absurd * * * they are opinions that have been entertained for two hundred years by as intelligent men as have ever spoken the English language, and men have borne every persecution that the old martyrs ever bore in defense of these principles—educated, intelligent men; and I think we ought to respect them" (*id.* at 205). Senators Ten Eyck and Doolittle also took note of the persecution that Quakers had borne because of their refusal, on religious grounds, to do military service (*id.* at 205, 208), and Senator Lane stated that a Quaker could not be forced into the ranks of the Army, and that if he were "he would be worthless as a soldier" (*id.* at 206).

One exchange in particular underlines the fact that Congress intended that exemptions extend only to those who were directly forbidden by their religion to bear arms, and not to those who were pacifists for other reasons. Representative J. C. Allen offered an amendment extending the exemption to "any person who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms." In its support, he contended (63 Cong. Globe 576):

It seems to me that we exonerate a class of individuals who are conscientiously opposed to bearing arms simply because they belong to a particular religious society whose articles of faith prohibit it, we ought to extend the exemp-

tion so as to embrace all who have conscientious scruples on the subject. I cannot understand why it is that mere membership in a particular religious society should exempt a man because he happens to have conscientious scruples. It is not with the articles of faith of religious societies that we have to do, but with the conscience. The mere fact that a man has cast his lot with the Quakers, the Moravians, or the Dunkers ought not to exonerate him unless we exonerate those who have conscientious scruples against bearing arms who may belong to some other religious society, or to none whatever.

In reply, Representative Grinnel pointed out that the opposition of Quakers and other similar sects to bearing arms arose not from mere scruple, but from beliefs traditionally and tenaciously held (*ibid.*):

If you examine the conscription bill enacted in the rebellious States, you will find that even there, having found the Quakers would not fight, they exempted them. Thus even the demons of rebellion do not now drag into their service the Quakers. In fact they could not. There is no power that could compel them effectively to bear arms. Their history shows that for more than two hundred years no nation has ever succeeded in bringing that denomination into the ranks as fighting men. Their religious conviction and zeal are stronger than the chains that would bind them or the dungeons that would confine them. * * * We should not at this day trifle with religious scruples and these men, who have laid the foundations of commonwealths in peace, whose children are reared in principles of peace, who have been always in favor of

peace and opposed to bloodshed. We cannot put forth any claim to religious and Christian principles if we fail to respect the conscientious scruples of men who have no new-born creed; who have been firm and decided in their principles, and patriotic and just as citizens, ever since the nation has had an existence.

Representative Allen's amendment was thereupon rejected. *Ibid.* Thus it appears that the Civil War Congress rejected the concept that mere opposition to war, even though derived from noble principles, should be sufficient to constitute an excuse from military service. Congress deliberately chose to exempt only those belonging to sects which made non-participation in war a vital part of man's religious obligation.

The one departure which the Civil War statute made from most prior State enactments (as well as from that of the Confederacy) was to abandon the requirement that the exempted person procure a substitute or pay a commutation fee for use in the general military effort. Instead, the commutation fee was to be earmarked for the benefit of the sick and wounded, a purpose to which Quakers and other non-resisters did not object. Senator Harlan observed that it was the Quakers' belief that "[w]e might as well bear arms as hire a man to bear arms in our stead" (63 Cong. Globe 205), and Senator Lane noted that, as a practical matter, it cost the government ten times as much as it received when it tried to collect money from Quakers in lieu of military service (*id.* at 206).

3. World War I

The Selective Draft Law of 1917 abandoned any requirement for the payment of a commutation fee, but otherwise adopted the approach followed in prior legislation. The statute provided (40 Stat. 78):

[N]othing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant * * *

Senator Thomas offered an amendment which would have deleted the requirement of membership in a "well-recognized religious sect or organization," thereby extending the exemption to "any person who is conscientiously opposed to engaging in such service." 55 Cong. Rec. 1478. He explained (*id.* at 1473):

I want * * * to emphasize what seems to be one of the gravest injustices of this exemption section. I refer to that part of it which is designed to exempt from the operations of the bill those who have conscientious scruples against

war, and then confining the exemption to those who, having such scruples, are members of denominations of which that is one of their articles of faith. * * *

I am unable to perceive, Mr. President, how and by what process of reasoning a man who is conscientiously opposed to war and not a member of a religious denomination must submit to the requirements of this measure, while his neighbor, possessed of such scruples and belonging to a religious denomination, is made exempt. If we are to exempt that class of people, fundamentally the line of division should not be drawn between those who, in addition to possessing the scruples, are members of churches and those who do not possess any affiliation with churches. Consequently, I want, as soon as this amendment is disposed of, to offer the one to which I now refer, in the hope that that invidious discrimination will be stricken from this bill.

In similar vein, he stated (*id.* at 1478):

My amendment, however, will equalize this bill and make the exemption as extensive as the thing which it assumes to exempt whether the individual coming within the exemption belongs to a religious denomination or not.

Opposing the amendment as offering too extensive an exemption, Senator McCumber argued that "this provision practically excuses from entering into this war any American citizen who has a conscientious objection against joining the service in this war; and,

of course, it practically annihilates and destroys the whole system of compulsory service provided in the bill." 55 Cong. Rec. 1478. Senator Phelan also rejected the idea that it was necessary or desirable "to equalize all classes of citizens, those who do not belong to any society and those who do belong to societies, which for time immemorial or since their foundation, have been opposed to war." *Ibid.* He quoted from a letter to him from the presiding moderator of the California yearly meeting of the Quakers, which stated that three times each year the members of the society were asked (*ibid.*):

Do you maintain the Christian principle of peace and consistently refrain from bearing arms and from performing military service as incompatible with the precepts and spirit of the Gospel?

Senator Phelan emphasized that "[i]f we respect an organization of this kind that has for a long time, not in contemplation of this war or any other war, conscientiously declared its principles, it would be well for us to do it without opening the doors to every slacker who, without any sincere and long-established convictions might declare also his so-called 'conscientious scruples' in order to avoid service." *Id.* at 1478-1479.

After Senator Brady, in speaking against the amendment stated that "[t]he committee gave careful consideration to all of these matters and has presented

here a bill that is workable and fair," the amendment proposed by Senator Thomas was rejected.²⁹ 55 Cong. Rec. 1479. Thus, Congress in World War I continued the policy of the Civil War Congress—that of exempting only those whose adherence to principles of non-violence derived from acceptance of the creed of religious denominations which taught that military service was forbidden.

Even though the World War I statute restricted exemptions to members of "well-recognized religious sect[s]," the Selective Service System found it impracticable to compile a list of "recognized" sects and left the matter to the discretion of the local boards. *Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918*, p. 56. As a result, some boards treated religious and non-religious objectors in the same manner, irrespective of the statute. *Report of the Provost Marshal General to the Secretary of War on the First Draft Under the Selective-Service Act, 1917*, p. 59. Finally, by Presidential regulation dated March 20, 1918, it was ordered that noncombatant service be opened to all inductees who objected to participation in war because

²⁹ Prior to consideration of the Thomas amendment, the Senate rejected an amendment by Senator LaFollette which would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war." 55 Cong. Rec. 1474, 1478. The Senator admitted that the intent and effect of his proposal was to excuse those persons of German and Austrian ancestry who had "conscientious objections" against going "into the service to fight against their own kith and kin." *Id.* at 1476.

of conscientious scruples, whether or not they were certified by their local boards to be members of a religious sect or organization as defined in the act. *Second Report of the Provost Marshal General supra*, pp. 58-59. This administrative deviation represents the only occasion, so far as we can ascertain, when exemptions were granted because of non-religious opposition to war. However, unlike the present Act, the World War I statute provided for induction of objectors and excused them only from combatant service; and non-combatant service was defined to include the Medical Corps (both front line and rear zone), the Quartermaster Corps (both rear zone and in the United States), and engineer service (both rear zone, including construction of rear line fortifications, and the United States). *Ibid.*

The statutory exemption, as confined to members of "well-recognized religious sects," was held constitutional in the *Selective Draft Law Cases*, 245 U.S. 366, and subsequent decisions discussed at pp. 20-22 above. The constitutionality of the classification was specifically attacked both because it distinguished between objectors who based their views on religious convictions and those whose views came from within themselves and because it distinguished between objectors who belonged to a sect which opposed all war and not to religious objectors who did not belong to such a sect. The precedents, therefore, sustain the classification made by Section 6(j) as well as the power of Congress to seek to accommodate freedom of religion to the needs of national defense. For Section 6(j) is

more liberal than the Selective Draft Act of World War I and the classification is less subject to challenge, if it can be challenged at all, on the ground that it discriminates between religions.³⁰

4. The Present Act

The exemption provision with which we are here concerned was first adopted in the Universal Military Training and Service Act of 1948. The provision, however, is an outgrowth and refinement of the one adopted in the Selective Training and Service Act of 1940, and can be understood only by tracing in detail the history of the latter statute.

The 1940 law made one radical departure from the statutes under which exemptions had been granted in the past: it abandoned the requirement that the objector belong to a sect or denomination whose creed forbade him to participate in military activities; instead, it extended the exemption to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 54 Stat 889. That change, however, entailed neither an abandonment of the concept of extending exemptions only to those who believed that they were under a religious obligation not to bear arms, nor acceptance of the premise that a merely philosophical opposition to war is sufficient to justify an exemption. The 1940 act simply shifted the emphasis from church teachings to the individual's own beliefs. Congress

³⁰ In our view Section 6(j) does not discriminate between religions as that term is used in the First Amendment. See pp. 73-77 below.

recognized that not every member of a sect accepts every tenet of the creed, that church members often arrive at different moral conclusions, and that many other individuals are religious without belonging to organized sects.

When the 1940 act (known as the Burke-Wadsworth bill) was first introduced, its provision relating to religious objectors duplicated the language of the World War I enactment. Hearings on S. 4164 before the Senate Committee on Military Affairs, 73d Cong., 3d Sess. 3. However, a number of witnesses—most of them representatives of church groups—appeared in favor of a broader exemption. See *Congress Looks at the Conscientious Objector* (National Service Board for Religious Objectors, 1943). Some of the witnesses were not themselves conscientious objectors, but sought to protect the interests of objectors of their own and other denominations. Their position was summed up by a non-church witness, Dr. Howard K. Beale of the American Civil Liberties Union, who testified that “[m]ost of the religious denominations have made provision for registration of conscientious objectors and have gone on record as determined to stand by the minority members of their faith whose reading of the teachings of Jesus have made them conscientious objectors to war.” *Id.* at 86.

Dr. Beale inserted in the record before the Senate committee a group of resolutions and statements issued by most of the major denominations. The Reformed Church in America stated that it recognized the right of any minister or communicant “to follow the leading of his conscience before God” and the

Oxford Conference on the Church, Community, and State maintained that the church should help its members "to discover God's will" and "should then honor their conscientious decisions," whether to participate in or abstain from war. *Congress Looks at the Conscientious Objector, supra*, pp. 87, 88. The Executive Board of the United Lutheran Church in America recognized "the individual right to conscientious objection to service in a war" because "[w]e believe that the conscience of the individual, informed and inspired by the Word of God, is the final authority in determining conduct" and, while "[s]uch recognition does not imply the Church's approval of such conscientious objection," it "does proclaim its devotion and respect for the Scriptural principle of the supreme moral responsibility of the individual conscience. Acts 5:29." *Id.* at 89. The Protestant Episcopal Church requested the same status as was accorded to Quakers for those of its members who were "unwilling for conscience's sake to take human life in war" and hence "conscientiously unable to serve in the combatant forces," since "it is the duty of Christians to put the cross above the flag in any conflict of loyalties unhesitatingly to follow the Christ." *Id.* at 87. The Presbyterian Church proclaimed "adherence to the principle that Christians owe allegiance to the kingdom of God that is superior to loyalty to their own country, and that in any matter in which the laws of their country conflict with the commands of God, they must assert their duty and right to 'obey God rather than men'" and on that basis supported

those of its members "who object to war on the grounds of their religion." *Ibid.* The Disciples of Christ stated that it recognized "the right of individuals to follow their own consciences in matters of practical conduct," and, taking note that "there are within the membership of the Churches of Christ individuals who, as conscientious followers of Jesus, cannot take part as combatants in any military warfare," it requested exemption for such individuals "on the basis of this conviction of Christian faith." *Id.* at 89, 87.

In addition, representatives of various churches testified before the Senate and House committees considering the bill. The position of the Disciples of Christ was explained more fully by the Reverend James A. Crain (*Congress Looks at the Conscientious Objector, supra*, p. 83):

May I say, as secretary of a department of social education and social action, as to the exemption of conscientious objectors, as a non-credal body it is obviously impossible for the Disciples of Christ to make refusal to do military service an article of doctrine of the church. Such would be repugnant to their ideal of freedom of individual conviction and of individual responsibility to God. The same principle, however, commits them to unqualified support and approval of those within their fellowship whose concept of their duty to God forbids them to participate in war or to take human life.

C. S. Longacre, general secretary of the Religious Liberty Association of America, representing the Seventh Day Adventists, proposed that, in addition to an

exemption for members of the historic peace churches, an exemption also extend to "any person, though a member of an organization whose creed or principles do not forbid the bearing of arms but who individually has religious scruples against the bearing of arms." *Id.* at 71." The Council for Social Action of the Congregational and Christian Churches asked that there be substituted for the bill's original language an exemption for "persons whose sincere conscientious, religious beliefs, principles and convictions forbid him" to participate in War. *Id.* at 79."

³¹ The proposal of the Seventh Day Adventists suggested exemption only from combatant training, but not from military service as such. *Congress Looks at the Conscientious Objector*, *supra*, p. 71.

³² The statements of other churches were more general in that they supported accommodation for individual conscience without offering supporting justification. Thus, the General Council of Congregational and Christian Churches and the Evangelical Synod of North America merely asked that the objections of members of their denominations who had scruples against war be given the same recognition as was given to the objections of members of the historic peace churches, and the American Unitarian Association resolved merely that conscientious objection "is entirely consistent with the historic principles of the Unitarian fellowship." *Congress Looks at the Conscientious Objector*, *supra*, pp. 86, 87. The Methodist Church of America asked exemption for its communicants who had scruples against war because "conscientious objectors . . . are a natural outgrowth of the principle of good will and the Christian desire for universal peace," and the Northern Baptist Convention stated that its denomination had "always stood for the supremacy of conscience." *Ibid.* In all probability these statements were based on the same reasoning as the more specific positions taken by the other denominations.

In short, the record before the Senate and House committees considering the draft legislation was replete with statements supporting the view that each individual determines the duties that God imposes upon humans in the conduct of their lives. Exemption was requested for those, regardless of the sect to which they belonged, who, in the exercise of that responsibility, determined that their religious view forbade all participation in war. Although the churches suggested that the restriction of the exemption to members of "peace churches" be abandoned, they still viewed the purpose as the accommodation of the needs of national defense with religious freedom, *i.e.*, an exemption for those who believed themselves under an obligation to God to abjure military service.

An exchange between Senator (later Justice) Minton and Frederick J. Libby (a Quaker representing the National Council for Prevention of War), illustrates this point. After Mr. Libby stated that Quakers did not believe that there was grounds to accord them special treatment not accorded to conscientious objectors who were members of other faiths, the Senator asked if he did "not think there is a difference between that group whose conscientious objections are based upon a religious belief that they learned at their parents' knees and just some idea that he has that he does not want to serve?" *Congress Looks at the Conscientious Objector, supra*, p. 29. The witness replied that he thought "that the opposition of most young people to war is really on the

basis of its futility as a method." ³³ *Ibid.* When the Senator, admitting the futility of war, suggested that the country might not have any choice as to whether it would become involved, the witness shifted his argument and stated that many non-Quaker ministers had taken the Quaker position "and there are young people who have been taught that same point of view and hold it now as firmly as the Quakers." *Ibid.* The Senator then brought up again the distinction between those who had been taught pacifism from childhood and those who merely decided for themselves that they would not fight, and the witness replied that "there are thousands and tens of thousands of young people who are just as conscientious in their rejection of the war method as they understand the Christian religion as the Quakers are." *Ibid.* He then told a general who, when asked how he could reconcile war with his Christian principles, replied that he could not and would not "pretend to take Christ with me into that war." *Id.* at 30. Mr. Libby then commented (*ibid.*):

Now that is a very significant statement, because it confronts a young man with a choice between two great loyalties—one his loyalty to God; the other, his loyalty to his country. I do not know any other loyalties that are so compelling as those; and if a young man has to choose between them because he becomes convinced that war is wrong, as General O’Ryan was convinced, then it is irreconcilable

³³ This is one of the major grounds offered by respondent for his pacifist beliefs (R. 66).

with the teachings of Christ; then he has to decide who is supreme in his life.

And finally, when Senator Minton stated that he thought "it is a poor thing for anybody to tell the Congress of the United States that they will counsel anybody to turn their back upon their country in the hour of its need and refuse to do what the duly elected representatives of this country in Congress determine is necessary to be done in defense of the country," the witness replied that "there is a higher loyalty than loyalty to this country, loyalty to God." *Id.* at 30, 31. Thus, although this witness attempted initially to justify an exemption for those who oppose war "on the basis of its futility as a method," he rested ultimately, as did the other proponents, upon the concept that "loyalty to God" is higher than "loyalty to country."

Further indication of the intention of Congress in amending the Burke-Wadworth Act is provided by an examination of the proposals which the committees rejected. Abraham Kaufman, executive secretary of the War Resisters' League, in opposing the entire bill, said that his group rejected "not defense, but military defense," and proposed reliance upon passive resistance, as in India. *Congress Looks at the Conscientious Objector*, *supra*, pp. 21-23. As an alternative to rejection of the bill, he asked "[r]ecognition of the nonreligious as well as the religious objectors," stating that the former are "citizens whose point of view is closely akin to the religious conscientious objector." *Id.* at 82. Reverend Paul Schilling, chair-

man of the Committee on World Peace of the Baltimore Conference of the Methodist Church, proposed either rejection of conscription entirely or "adequate provision for all genuinely conscientious objectors to military training and service, whether their objections spring from religious, ethical, or philosophical grounds." *Id.* at 82-83. To accomplish this purpose, Reverend Schilling suggested deleting the words "by reason of religious training and belief" and extending the exemption to "any person who is conscientiously opposed to participation in war in any form." *Id.* at 83. The same phraseology was also proposed by Dr. Beale, on behalf of the American Civil Liberties Union, who stated that his organization stood for the rights of Quakers, conscientious objectors from other denominations, and "conscientious objectors on nonreligious grounds who by established membership in organizations like the Fellowship of Reconciliation can establish the sincerity of their objections." *Id.* at 85."

The committees thus heard the full range of arguments in favor of an exemption for ethical and philo-

* However, like Frederick J. Libby, Dr. Beale in support of his argument in favor of an expanded exemption, relied upon the impasse which only the religious objector encounters (*Congress Looks at the Conscientious Objector*, *supra*, p. 85): "[m]any of the conscientious objectors will stand out against the law, will persist in putting loyalty to God above loyalty to their country's laws" and "[i]t is a terrible thing for a man of devotion and high principles who loves both his God and his country, to be told that he must choose between them."

sophical reasons in addition to religious conscience; they were presented with language designed to reach this result. By choosing the phrase "religious training and belief" Congress made plain its intent to continue the historic practice of excusing from combatant training and service and assigning to other national service only those who believe they are required by their religion, meaning their relation to a Supreme Being, not to participate in war in any form.

The Second Circuit, in *United States v. Kauten*, 133 F. 2d 703, misconstrued the reason for the abandonment of the requirement of membership in an historic peace church and assumed, quite contrary to the legislative history, that Congress intended to "take into account the characteristics of a skeptical generation." *Id.* at 708. From that erroneous assumption, it proceeded to the conclusion that Congress made "the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption," overlooking the fact that the Congressional committees had specifically rejected language that would have extended the exemption in terms of conscientious scruple alone and had added the modifying phrase "by reason of religious training and belief." *Ibid.* The court said that Congress intended by "religion" to include "a response of the individual to an inward mentor, call it conscience or God; that is for many persons at the

present time the equivalent of what has always been thought a religious impulse." ³⁵ *Ibid.*

The Ninth Circuit differed. In *Berman v. United States*, 156 F. 2d 377, certiorari denied, 329 U.S. 795, it noted that if it decided "that the exemption from military service written into the statute runs to all who sincerely entertain conscientious objection to participation in war * * * the phrase 'by reason of religious training and belief' would have no practical effect whatever." *Id.* at 382. Hence, it concluded that the phrase "was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." *Id.* at 380. It reiterated this point by quoting (*id.* at 381) from the dissent of Chief Justice Hughes (with Justices Holmes, Brandeis, and Stone concurring) in *United States v. Macintosh*, 283 U.S. 605, 633:

The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.

Both the *Berman* and *Kauten* decisions were before Congress when the present statute was adopted in 1948. Congress signified that *Berman* constituted the correct interpretation of its views by adopting the

³⁵ The statutory interpretation in *Kauten* was dicta, but the Second Circuit applied the interpretation in *United States ex rel. Phillips v. Downer*, 135 F. 2d 521, and *United States ex rel. Reel v. Badt*, 141 F. 2d 845, to extend the exemption to objectors with views similar to those of respondent here.

definition of "religious training and belief" which the Ninth Circuit had borrowed from *Macintosh* and saying, as to the exemption provision (S. Rep. No. 1268, 80th Cong., 2d Sess. 14):

This section *reenacts substantially the same provisions* as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F. 2d 377, certiorari denied, 329 U.S. 795.) [Emphasis added.]

In sum, Section 6(j) is the product of a long period of evolution. Congress considered more than once, after full debate or testimony, what class should receive any special treatment accorded persons otherwise eligible for the draft who were opposed to participation in war in any form. The line of development has been remarkably consistent. The exemption, with few exceptions, has been confined to persons who belonged to religious sects opposed to war or to those whose individual religious beliefs gave them that conviction. From the day James Madison suggested that "no person religiously scrupulous shall be compelled to bear arms" (1 *Annals of Congress* 749) through the enactment of Section 6(j), there was general agreement that such an accommodation of religious freedom with national service neither created an unconstitutional discrimination nor violated the principle of separation be-

tween church and state. While long existence cannot validate an unconstitutional practice, the fact that Section 6(j) is consistent with American tradition goes far to demonstrate the reasonableness of the legislative classification and its consistency with the Constitution.

**B. THE STATUTORY DEFINITION IS REASONABLY ADAPTED TO PROMOTING
THE FREE EXERCISE OF RELIGION**

In our view, the line drawn by Section 6(j) is substantially that between "religious" objectors, using the term "religious" as in the First Amendment, and all other pacifists. In his dissenting opinion in *United States v. Macintosh*, 283 U.S. 605, 633-634, Chief Justice Hughes stated:

The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.

The Court later approved that definition," and Congress substantially adopted it in Section 6(j).

In our brief in *United States v. Jackson*, No. 51, this Term, pp. 18-23, we discuss at greater length the meaning of Section 6(j). It is sufficient here to say that Congress intended to cover all conscientious objectors whose opposition to war came from obligations superior to those resulting from man's relationship to his fellow man. The statute itself states that "[r]eligious training and belief * * * means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially politi-

* Chief Justice Hughes' views in effect became the law in *Girouard v. United States*, 328 U.S. 61, which overruled *Macintosh*.

cal, sociological, or philosophical views or a merely personal moral code." The expansion of the definition in Chief Justice Hughes' opinion from belief in "God" to belief in "a Supreme Being" strongly suggests that Congress was not requiring belief in any traditional concept of God, but was allowing for any form of belief based upon a superior obligation, as distinguished from a sociological, philosophical, or ethical one. Moreover, the history underlying Section 6(j) strongly supports this broad reading of the statute. At the least, this is a reasonable construction which may be adopted to avoid constitutional doubts arising from granting exemptions to persons holding one religion and not those holding another.

Relying on *United States v. Kauten*, 133 F. 2d 703 (C.A. 2), and *Torcaso v. Watkins*, 367 U.S. 488, the court below and respondent say that the statute does not allow an exemption for all who believe in religion. In *Kauten*, the Second Circuit held that the phrase "religious training and belief"—which was left undefined in the 1940 predecessor statute—included "conscience," regardless of how this conscience was formed. The court did not say, however, that religion actually included all conscientiously held philosophical views; rather, it stated that conscience "is for many persons at the present time the equivalent of what has always been thought a religious impulse." And it indicated that religion, at least in this area, lay beyond convictions based solely upon reason.³⁷

³⁷ The full definition in *Kauten* was (133 F. 2d at 708):

"Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in most primitive and in most highly civilized societies. It accepts the

In *Torcaso*, this Court did not define religion. Instead, it held that the First Amendment prohibits placing the authority of the State on the side of those who believe in religion and against those who do not believe in religion. As the Court stated the law (*id.* at 495):

We repeat and again affirm that neither a state nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions against non-believers, and neither can aid these religions based on a belief in the existence of God against those religions founded on different beliefs.

At this point, the Court states in a footnote (367 U.S. at 495, note 11): "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism,

aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. * * * Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: 'Conscience is a God to all mortals.'; impelled Socrates to obey the voice of his 'Daimon' and led Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God.'

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

Taoism, Ethical Culture, Secular Humanism and others." We submit that the Court was assuming that these groups hold a belief in something beyond mere moral commitment to one's fellow man. Otherwise, all thoughtful people would be believers in religion and the Court's allusion to non-believers would include only those unwilling to take any position at all.

In our view *Torcaso* is inconsistent with *Kauten* and makes clear that religion is more than mere conscience. In *Torcaso*, the Court speaks of non-believers and of believers in religion who do not believe in the existence of God. Surely, "non-believers" does not mean people without conscience. Instead, non-believers, in the opinion as in common usage, means those people who recognize no authority above the obligation of man to his fellow man. In contrast, the Court clearly labelled as religious those who do not believe in God within the normal meaning of that word but who do believe that man has definite obligations to a force superior to himself."

For the foregoing reasons, we think that the classification established by Section 6(j) includes all "religious" objectors who are seeking to follow the commands of "religion" as that term is used in the First Amendment. But whether the lines drawn by the statute coincide exactly with the meaning of "religion" in the First Amendment is immaterial. Here, Congress has made a sincere and careful effort to

" See the discussion of the views of the eminent Protestant theologian, Paul Tillich, in *Jakobson v. United States*, 325 F.2d 409, 415-416 (C.A. 2), pending on writ of certiorari, No. 51, this Term.

exempt any person who is obeying his religious tenets from the necessity of choosing between defiance of the State and disobedience to the will of his particular God, however he may conceive Him. It is plain, too, that the statutory definition covers the core of "religious" objectors in the constitutional sense of religion even if there is argument about the periphery. There is room for the reasonable exercise of Congressional judgment in achieving the accommodation between freedom to obey religious obligations and the needs of national defense.

Whatever the disposition of cases in the penumbra there is a clear difference in principle between those who believe that in refusing to participate in military training or service they are following a divine command and those who conclude, on the basis of their own reasoning, that war is an improper instrument in human relations. As a matter of logic and definition, conscience and religion cannot be equated for purposes of the First Amendment. Conscience means a sense of good and evil; religion means a system of faith and worship regarding "God or a god." Webster's New Collegiate Dictionary (2d ed., 1959). On the other hand, if religion includes conscience, the First Amendment would be expanded beyond anything either the framers or this Court ever suggested. It would mean that a wide variety of governmental regulations would raise First Amendment issues whenever they happened to conflict with action taken by persons which was based on philosophical and moral views. For example, a man may have a strong philosophical belief that labor unions are evil. Surely, a free-

exercise-of-religion question is not raised if he refuses to bargain with a union in his plant.³⁹

The conflict of conscience and conscription in an objector whose religion forbids his participation in war is significantly different from that of the non-religious objector. The former believes that he has no choice; he will admit that whether or not he would independently have reasoned to the conclusion that all war is wrong is immaterial since he has an unalterable obligation superior to himself. Thus, most Orthodox Jews would not have themselves decided that pork should not be eaten, yet they believe that to do so would break God's law. When the government tells such a religious man to do something which he believes God has forbidden him to do, he is faced with a conflict of authority. And he firmly believes that God, not man, is the higher authority.

On the other hand, non-religious objectors, like respondent, reach their moral positions entirely on the basis of their own reasoning. They generally look to history and their own experience to determine what is best for mankind (see R. 66, 73-76). They have no obligation to an authority outside themselves. Thus, when Congress requires that they serve in the armed forces, their dilemma is that they are forced to do

³⁹ There is no doubt, and respondent does not argue to the contrary, that respondent's views do not come within the exemption as construed in the discussion above. He does not know whether God exists, believes in purely ethical principles, and opposes war entirely because of its effect on humanity (see the Statement, pp. 3-7 above). On the other hand, the government has stipulated that respondent does oppose war on the ground of conscience and therefore satisfies the definition of religion in *Kauten* (R. 49).

something which they seriously believe is wrong for mankind.

We do not minimize the seriousness of the dilemma in which the non-religious objector is placed. Quite possibly Congress might choose, as the British Parliament apparently has chosen, to exempt other conscientious pacifists in the interests of individual liberty, but the weight to be given to political, philosophical, or personal moral views in framing a universal military and training law is a legislative question. The dilemma of the non-religious objector is significantly different from the conflict of conscience of the man compelled to refuse to participate in war by his belief in a relation to a Supreme Being. Testimony before Congress repeatedly emphasized the extreme unfairness of placing religious men in that position (see pp. 65-67, 68, note 34 above). Congress had power not only to recognize the distinction but, in the penumbral area, to decide exactly where the line should be drawn in accommodating respect for religious obligations with the needs of national defense.

C. EXPERIENCE WITH THE EXEMPTION ATTESTS TO ITS REASONABLENESS

As shown in our discussion of the history of conscientious objection in this country, the line adopted by legislators has been remarkably consistent. That very consistency tends to show that the present legislative solution is essentially fair and workable. We know of nothing in recent experience to suggest the contrary.

The operation of the selective service system since Section 6(j) was enacted would also seem to indicate

that the compromise adopted by Congress has proved generally satisfactory. Peacetime conscription—a rare event in American history—has gone forward with what can certainly be described as a minimum of unrest and distress. Unquestionably, there has been widespread public acceptance. The exemption for conscientious objectors has neither resulted in an unduly large loss of manpower nor in an unduly large number of rejected claims for exemption. In the decade following the enactment of Section 6(j), a total of approximately 10,000 cases was referred to the Conscientious Objector Section of the Department of Justice. Smith and Bell, *supra*, p. 702. Of this total, approval of the claim was recommended in about 80 percent of the cases.⁴⁰ A large portion of the claims rejected reflect a determination that the applicant was not sincere. The hundreds of thousands of men called who did not claim to be objectors have apparently accepted as reasonable and just the exemption from combatant service of those opposed to war in any form because of their religious belief in their relation to a Supreme Being.

We do not contend that the successful operation of the present classification establishes that the line drawn by Congress is the ideal one. That can neither be proved nor disproved. It does appear, however, that, both from the official and the public standpoint, the law has operated successfully and with remarkably little friction. This in turn constitutes persua-

⁴⁰ Although the Department's recommendation to the Appeal Board is not binding upon the board, experience has shown that these recommendations are followed with very infrequent exception.

sive evidence that Congress has made an allowable judgment.

The fact of widespread public acceptance is one of particular significance in this area. Those who serve in the armed forces do so at no small sacrifice. Some may need no urging to serve their country in its hours of crisis. For many, however, the duty to serve in that demanding and dangerous capacity is rendered considerably more tolerable by the knowledge that it is a well nigh universal obligation in which they are called upon to share. Thus, an exemption which would broadly excuse from combatant service all of those who sincerely dislike or oppose the idea of war would not only threaten to deplete the available source of manpower; it would also tend to cause disaffection, perhaps on a very serious scale, among those who remain to shoulder the burden. Congress is thus called upon to strike a delicate balance—to accord a measure of relief to those whose situation appeals most compellingly to the instincts of toleration and compassion, yet to stop short of exemptions so broad or so numerous as to undermine confidence in the concept of universal service.

D. THE DISTINCTION DRAWN BY SECTION 6(j) BETWEEN A RELIGIOUS OBLIGATION TO A SUPREME BEING AND A POLITICAL OR PHILOSOPHICAL CONVICTION OR A PERSONAL MORAL CODE CONFORMS TO THE RELIGIOUS TRADITIONS OF THE AMERICAN PEOPLE

The widespread public acceptance of the exemption for conscientious objectors as classified in the present selective service system is no doubt due largely to the fact that the definition of "religious training and belief" in Section 6(j) is in keeping with the ideals and traditions of the American people. Their religious

character has been repeatedly noted in the opinions of this Court. In *Abington School District v. Schempp*, 374 U.S. 203, 213, the Court reiterated the specific recognition it had given to this fact in *Zorach v. Clauson*, 343 U.S. 306, 313:

We are a religious people whose institutions presuppose a Supreme Being.

Chief Justice Hughes, dissenting in *United States v. Macintosh*, 283 U.S. 605, 633-634, stated the understanding of religion shared by the great majority of the American people:

The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U.S. 333, 342: "The term 'religion' has reference to one's views on his relations to his Creator, and to the obligations they impose of reference for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

No court today is likely to repeat in a literal way the assertion that, "We are a Christian people," but there is scant dissent from the proposition that we are a people "according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." *United States v. Macintosh*, *supra*, 283 U.S. at 625.

This widely-held consensus of opinion would not support aid to religion or discrimination against non-

believers. Compare *Engel v. Vitale*, 370 U.S. 421; *Abington School District v. Schempp*, 374 U.S. 203. But the consensus is relevant in defining the class of those exempted from combatant duty and assigned to other national service, provided that the government may seek to accommodate the needs of national defense with the free exercise of religion, as we have contended. For, as Mr. Justice Brennan pointed out in *Abington School District v. Schempp*, 374 U.S. 203, 295, nothing in the Constitution compels the government to blind itself to religious beliefs in the application of legislation for purely secular ends where the effort is to alleviate burdens upon the free exercise of each citizen's religion.

In determining whom to assign to noncombatant national service because of conscientious opposition to participation in war in any form, Congress had strong reason to take into account the deep-seated convictions of the American people. The scope of the exemption from military service accorded to "conscientious objectors" is a matter of concern not only to those who qualify and those who might desire an exempt status that Congress denied them; it also affects all other men—and also their families—when called for military training or service. It is one thing for a man to be called upon for the same service to which all whom he feels are similarly situated are also subject; it is another to be called to serve—or to have one's son or husband summoned—when others have been excused who were widely regarded as fairly subject to the same obligation.

The line drawn by Congress has its roots in the beliefs of the men and women affected by the draft. Whatever nice distinctions must be drawn in its application, the great bulk of the people affected would find the governing principle in section 6(j) both understandable and fair—more understandable and fairer, we suspect, than any other that might be developed. Since their response bears upon the workability of the law and thus upon its secular objectives, the conformance of the distinction to our religious tradition goes far to demonstrate the reasonableness of the classification.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 76

ELLIOTT ASHTON WELSH, II,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF

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Bertelsman, *The Ninth Amendment and Due Process of Law—Towards a Viable Theory of Unenumerated Rights*, U. of Cincinnati Law Rev., Vol. 37, pp. 785-796 7

Minnesota Law Review 36:1, p. 72 9

14 Papers of Thomas Jefferson 18 (Boyd ed., 1958) 6

Religion and the Law, Aldine, 1962, pp. 37-38, 40-41 8-9

The American Treasury, Ed. Fadiman (1955) 7

The Federalist, No. 84 6

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 76

ELLIOTT ASHTON WELSH, II,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF

Three points have been briefed in this case:

- I. Whether Welsh can be considered "religious", within the intent of the conscientious objector provisions of the Act.
- II. Whether the Act, as applied to him, offends the Constitution.
- III. Whether the induction proceedings require reversal.

Welsh's Beliefs Are Within the Intent of the Law.

We have argued that petitioner Welsh is factually and legally in a status similar to the petitioners in *Seeger v. United States*, 380 U.S. 163 (1965).

The Government argues that he has neither the training nor the belief required.

We now add the following:

A. Welsh's "training" is sufficient.

In re Nissen, 146 F.Supp. 361, 363 (D.Mass. 1956):

"... it seems reasonable to conclude that so far as Congress was thinking of training it regarded it as meaning no more than individual experience supporting belief; a mere background against which sincerity could be tested. I confess this is an appealing position, both logically and administratively. If the purpose is to exempt from military service citizens, or would-be-citizens, who have certain religious convictions, the manner in which they attained them is entirely unimportant except insofar as it may assist in ascertaining whether they did."

B. Welsh's belief is sufficient.

There is no basis in the record for concluding that Welsh is an atheist or that his beliefs are legally less "religious" than Seeger's. See Appendix 31, where, in his letter to the local board, he concludes: "I cannot fully account for my decision intellectually". Also, note that dissenting circuit judge (Hamley) concluded, after reviewing the evidence, that there was no basis in fact for the Selective Service System's determination that its registrant Welsh's objections were not of a religious nature. See Appendix 74-81.

We submit that there is a close parallel between the beliefs of Welsh and Seeger, in fact and in light of this Court's *Seeger* opinion.

We invite attention to the following:

Menander, as quoted in *United States v. Kauten*, 2nd Cir., 1943, 137 F.2d 703:

"Conscience is a God to all mortals." (708)

Shacter v. United States, Crim. No. 28278 (D.Md. Dec. 12, 1968):

"The government further notes that defendant told his draft board that he was an atheist. This statement, considered in the context of the records as a whole, would not provide a basis in fact for concluding that defendant's beliefs were not reached by reason of religious training and belief, as that term has been construed by the Supreme Court in *Seeger*. One of the approved meanings of the word atheist is one who does not believe in an orthodox God. But one who does not believe in an orthodox God is not disentitled under the terms of the statute to claim exemption to such classification in spite of his expressed disbelief in the existence of God."

U. S. ex rel. Phillips v. Downer, 2nd Cir., 1943, 135 F.2d 521:

"Hence we said in the *Kauten* case, 133 F.2d at page 708: 'The provisions of the present statute are more generous for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption.' And we found religious belief to arise 'from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe,' a belief 'finding expression in a conscience which categorically requires the be-

liever to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."

Seeger v. United States, 380 U.S. at 173:

"No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs."

The question here, in Welsh's case, is between "religious" and what is commonly considered "non-religious" belief.

Although Welsh is not an atheist and we do not have to argue that an atheist (as in *Shacter*, supra) can qualify as a conscientious objector we do believe that a "religious atheist" is not a contradiction in terminology and that such a person could qualify.

C. Another constitutional problem arises: The Ninth Amendment.

The government argues that a qualitative difference exists

"between religious and non-religious objection to war is one which Congress could reasonably recognize in deciding whom to subject to involuntary military service. The Constitution does not set up freedom of conscience, it does not equate conscience with religions." (p. 31).

There are at least two answers to this:

First, there is an ever growing volume of opinion equating conscience and religion:

In addition to *United States v. Sisson*, D.Mass., 297 F.Supp. 902, two other courts have held identically: *Koster v. Sharp, et al.*, 303 F.Supp. 837 (E.D. Penna., 1968) and *Goguen v. Clifford*, 304 F.Supp. 958 (D.N.J. 1963);

"The practical effect of *Koster and Sisson*, with which this Court is in accord, is to leave as the sole test for discharge, on the basis of conscientious objection, that of sincerity of one's conviction that war is wrong. Since the sincerity of petitioner is unquestioned, his request for a writ of habeas corpus shall be granted."

Next, this argument of the government brings the Ninth Amendment into the picture: that conscience is an area reserved to the individual and that it may not be invaded by Congress. To bring this into sharper focus we repeat the government rationale:

Arguing that there are no Constitutional limitations in the attempt by Congress to distinguish between religious and non-religious objections to war, the Government asserts that, "The Constitution does not set up freedom of conscience, it does not equate conscience with religion. Nor was Congress bound to do so. Congress could reasonably draw the line as to who shall and who shall not be compelled to serve by taking into account, as the Constitution does, the right to exercise one's religion freely". [page 31]. Thus, the Government urges the rejection of the formulation which equates the free exercise of conscience with the free exercise of religion, implying that free exercise of conscience is not entitled to equal Congressional concern. While our arguments above implicitly accept the formulation that free exercise of conscience is protected by the First Amendment, we will show that the bifurcation of the rights of free exercise of religion and free exercise of conscience does not lead to the conclusion that freedom of conscience is not constitutionally protected. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". It would appear that this amendment precisely anticipates

and contradicts the Government's contention that freedom of conscience is not a Constitutionally protected right because, "[the Constitution] does not equate conscience with religion". That the authors of the Constitution were aware of the danger inherent in enumerating certain rights is shown by their concern over the adoption of the Bill of Rights. On this subject in *The Federalist* No. 84, Hamilton, urging the adoption of the Constitution without a bill of rights, said:

"Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations.

"WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound better in a treatise of ethics than in a constitution of government." (Emphasis in original).

Madison, who wrote the original draft of the Ninth Amendment,¹ wrote on the same subject in a letter to Jefferson in October, 1788:

"... there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely to be by an assumed power."² (Emphasis supplied).

1. See Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, American Bar Association Journal, Vol. 53, 1033-39.

2. 14 PAPERS OF THOMAS JEFFERSON 18 (Boyd ed. 1958). Quoted also in Abrams (footnote 1) p. 1035.

And from a speech by Samuel Adams:

"Driven from every other corner of the earth, freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country as their last resort."³

We would anticipate objections concerning the problems of defining unenumerated rights⁴ by conceding that such rights ought to be of a fundamental nature. In short, we would

"... agree that, in order to prevent judicial abuse, any formula for unenumerated rights must emphasize that the power of the courts to enforce such rights is to be exercised only in exceptional circumstances. Also the criteria for such rights should make as wide a claim as possible to universal acceptance, and be derived from the history and traditions of our people, and, so far as possible, of all peoples."⁵

Thus we contend that the right of free exercise of conscience is given constitutional protection equivalent to the protection granted the right of free exercise of religion and that Congress may not prefer one over the other. cf. *Griswold v. Connecticut*, 381 U.S. 479.

II

The Act, As Applied to Welsh Offends the Constitution.

A. The government first argues "accommodation".

The government brief is based on a theory of accommodation and its argument starts with, and is largely dependent upon the constitutionality of the 1917 Draft Law,

3. Samuel Adams, Philadelphia, 1776. From *The American Treasury*, Ed. Fadiman (1955).

4. See Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, U. of Cincinnati Law Rev., Vol. 37, pp. 785-796.

5. Ibid. 787 (footnote omitted).

as upheld in the Selective Draft Law Cases, 245 U.S. 366 (1918), also known as *Arver, et al.*

The *Arver* decision has been heavily criticized:

1. The Second Circuit in *U. S. v. Jakobson*, 325 F.2d 409, said: "The constitutionality of this provision under the First Amendment was upheld, rather summarily, in *Arver v. United States*, 245 U.S. 366, 389-90 (1918)."
2. Professor Philip B. Kurland, in *Religion and the Law*, Aldine, 1962.

"Mr. Justice White's opinion for a unanimous Court, rendered during the height of the American participation in World War I disposed of the issue quickly, but without authority or reason. 'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.'⁹⁰ The decision is as sound as reasons given for it." [37-38].

* * *

"Were it not for the Selective Draft cases [*Arver, supra*] it should be clear that exemption from military obligations in terms of religious affiliation is unconstitutional. If military service be considered a duty of every qualified citizen, exemption grants a benefit to religious adherents because they are religious adherents, a result banned by the separation clause. There should be little doubt, for example, that the Government could not refuse commissions in the military service to all members of specified religious sects. It can no more grant benefits on that ground than it can deny them, unless the wall of separation is again to be breached.

Cardozo's reference to *Davis v. Beason*¹¹⁰ suggested that the high wall was to be maintained." [40-41]

3. Harrop A. Freeman, Professor Law at Cornell University writing in 31 *Virginia Law Review* 40, at page 56 says—

"There are some who find in the court's opinion the attitude which Shakespeare made famous in the words: 'The lady doth protest too much, methinks.' For the court's argument is constantly advanced by this type of wording: 'cannot conceive', 'too frivolous for further notice', 'so devoid of foundation', 'not even a shadow of ground', 'to do more than state the proposition is absolutely unnecessary', 'unnecessary to follow', 'wholly unnecessary to explore', 'cannot be the slightest doubt', it is indisputable', 'fallacy of the argument', etc."

4. *Minnesota Law Review* 36:1

"The Selective Draft Law Cases decided, in a single cursory sentence,⁶⁴ that the 'well-recognized sect' provision of the World War I act was not an establishment of religion." [72]

B. The government uses the same argument against Welsh that it used against Seeger. See Supplement to Brief for United States, pages 2A and 3A:

"The essence of the statutory standard lies in the contrast between duties resulting from man's relationship to his fellow men and superior obligations owed to a God or ideal fairly characterized as divine.³

However broadly the words of Section 6 (j) are construed respondent Seeger does not qualify for the

64. 245 U.S. 366, 389 (1917): "And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."

statutory exemption. His views are 'a purely ethical creed.' He based his refusal to participate in military training entirely upon his judgment concerning the effect war has upon men and human affairs (R. 73). He derives his opposition to war, sincere as his conviction may be, not from religious teaching but from essentially political, sociological, or philosophical views. He is not responding to an obligation superior, in his conscience, to all human obligations; he is obeying a personal moral code based, according to his own statement, upon 'how he feels towards his fellow man.'"

Since Seeger does not qualify for the statutory exemption, he is forced to attack its constitutionality and argue that since the government chose to exempt those whose opposition to war is based upon belief in a duty rising above all human obligations, the government must also exempt those whose conscientious opposition is based upon ethical convictions derived from political, social, or moral philosophy, or some combination of the three."

III

The Induction Proceedings Require Reversal.

The Brief for Respondent argues that petitioner *refused* to accomplish the Security Questionnaire form and therefore cannot raise this point.

The Brief for Petitioner had argued that the governing regulations required that "A registrant who qualifies or refuses to accomplish DD Form 98 in its entirety . . . will not be inducted into the Armed Forces pending thorough investigation." [our page 26].

A. THE FACTS

The facts are (1) not that he refused but that he showed he could not sign it ~~in~~ its offered form and that he raised and expressed a question about it, and (2) that there was no "thorough investigation."

His testimony was reasonably clear on this (and no rebuttal was offered, or cross-examination made): "We weren't given time to read the forms. We came to a form that I didn't sign, couldn't sign, because he's asking me to sign—they were asking me to sign something I didn't feel I could sign and I raised my hand to indicate that I had a question about this form, and the gentleman who asked me what was the matter, and I told him that I couldn't sign the form because there's some things that had changed.

And he said to me, "Well, are you going to refuse induction," and I said "Yes."

And he said, "Well, do you want to be a fucking murderer about it." and I said, "No." And then he said, "Well, stand over in the next room and wait." [Appendix 52-53].

We take petitioner's conduct to mean one thing certainly: He wanted to *raise a question* about the form.

The personnel he encountered, at that point, seemed more concerned with the end result than with the requirements of the governing regulation, as the above dialog shows.

The opinion of the Court of Appeals shows this too:

"The investigative process is detailed in AR 604-10, § III, para. 18 (1959); 604-10, §§ IV, V (1959). Rather than delay appellant's induction pending investigation, induction station personnel ordered him to step forward. Appellant now contends that this procedural irregularity vitiates the command to step forward and, therefore, his conviction. We cannot agree." [Appendix 66].

B. OUR ARGUMENT

We argue from the above.

(1) His conduct, with respect to the Security Questionnaire, differs from his conduct when he was offered the induction ceremony. At the latter juncture he gave a flat refusal. His conduct at the security questionnaire juncture certainly was not a flat refusal. At the most it was a qualified refusal.

(2) His question concerning the form, his qualified refusal, deserved an answer or, as is true of the induction ceremony, at least a second opportunity.

(3) We do not claim that the governing regulation on security clearance explicitly recites that two opportunities are to be given. We do claim that the spirit of the regulation implies it as well as explicitly requiring a "thorough investigation." Also that fair dealing and precedent, with respect to the analogous (and immediately following) routine of induction, lends support to our interpretation, as we next argue.

As we pointed out in our Brief for Petitioner [p. 23] army regulations govern the proceedings at the induction station (now termed the Entrance Station), citing *Chernekoff v. United States*, 9 Cir., 1955, 219 F.2d 721, n. 12.

The holding in *Chernekoff* was that a repetition of the induction ceremony was to be given a "refuser" despite the selectee's flat refusal. Two dozen reported opinions refer to *Chernekoff*, but none of them refuses to follow its rationale:

"In the present case the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the appellant as he had

said he would not if asked to so do step forward and become inducted into the Armed Forces. It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words. In *Corrigan v. Secretary of Army*, 9 Cir., 1954, 211 F.2d 293, the court stated it is highly important that the moment a selectee becomes subject to military authority be marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty." [725]

(4) After *Chernekov* two other decisions of this same appellate court have a bearing on the principle involved in our case at bar. In *Briggs v. United States*, 9 Cir., 1968, 397 F.2d 370 the unanimous court held:

"Not all procedural irregularities vitiate an order to step forward for induction. Prejudice to the registrant from failure to observe regulations must be established."

(Citing a string of cases)

"The cases cited involve disregard of regulations by selective service system personnel. The disregard of regulations in this case was by military personnel. But no reason appears why the same rule should not apply, although the immediate effect in this case is to vitiate the order to step forward rather than the order to report for induction. Army Regulations, like selective service regulations, constitute part of the procedural framework governing induction. See *Mason v. United States*, supra [373].

Counsel have not cited, and we have not found, any cases which determine whether denial of a physical inspection is sufficiently prejudicial to vitiate the induction process.³

An analogy drawn from exhaustion of administrative remedies cases indicates that the denial of a

physical inspection should be held prejudicial. In *Falbo v. United States*, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305 (1944) the registrant appealed his conviction for failing to report for work of national importance. The Supreme Court held that he could not challenge his classification because he had not reported for work (and then refused to begin). The court indicated that if he had reported for work he might have been medically rejected."

* * *

"This same factor, the possibility of rejection and reclassification indicates that denial of a physical inspection to appellants was prejudicial. In the exhaustion of administrative remedies cases, this possibility is deemed sufficiently important to justify refusal to consider a registrant's claims of error. It appears reasonable that this possibility be deemed equally important when the military disregards the requirements of a physical inspection.

[3] We could assume that the likelihood of rejection in appellant's case was slight. The physical inspection is relatively cursory, and appellant had recently passed a more rigorous examination." [374].

In *Oshatz v. United States*, 9 Cir., 1968, 404 F.2d 9, the unanimous court held:

"Oshatz' next contention concerns the induction proceedings. He states and the government concedes that the 'loyalty' portion of the induction proceedings was not conducted in conformity with the regulations [11].

* * *

A myriad of regulations specify the procedural steps which must be followed by a registrant, the local board, the appeal board, and military personnel in order to accomplish the induction of a young man into the armed forces, or his exclusion therefrom. Because

there are so many regulations, which are often complex, and because the individuals who are expected to comply with the regulations are not legal experts, procedural irregularities are frequent. Even the most casual glance at the case law will reveal a staggering array of deviations from the regulations which have been advanced as defenses to prosecutions for refusal to submit to induction. The defenses have been unsuccessful where the procedural irregularities are minor and the registrant has not been prejudiced because of them [12].

* * *

In this case Oshatz might not stand convicted of a felony had he been given the opportunity to execute the loyalty questionnaire.⁴ Under the rationale of our decision in *Briggs v. United States*, 307 F.2d 370 (9th Cir. 1968), that is sufficient prejudice to require reversal." [12].

(5) Finally, the governing statute, the Universal Military Training and Service Act of 1951, as amended (50 U.S.C. App. § 462) has language that should apply to all procedures connected with its operation: "... a system which is fair and just."

By reason of the above we claim that petitioner should have been given a second opportunity to accomplish the security questionnaire.

CONCLUSION

We believe the constitutional point need not be reached, but if so then the Act, as applied to Welsh, should be declared unconstitutional.

Respectfully,

J. B. TIETZ

Attorney for Petitioner

January 15, 1970.